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No. 79

In the Supreme Court of the United States

October Term, 1947

The United States of America, appellant

v.

Paramount Pictures, Inc., et al.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 3504–3563) is reported in 66 F. Supp. 323, and its findings of fact, conclusions of law and decree are reported in 70 F. Supp. 53.

JURISDICTION

The judgment of the district court was entered on December 31, 1946 (R. 3694). Timely motions of all defendants to amend the findings of fact, conclusions of law and judgment were ruled upon on February 10, 1947 (R. 3719–3720). The

petition for appeal was filed on February 18, 1947 (R. 3720–3721) and allowed on February 21, 1947 (R. 3725).

The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345). Probable jurisdiction was noted on June 23, 1947[1] (R. 3840).

QUESTIONS PRESENTED

1. Whether, in view of the widespread and habitual abuse of the defendants' enormous economic power over the distribution and exhibition of motion-picture films, and in view of the conspiracy and attempt to monopolize, all of which the court below found, the relief granted by the trial court is so inadequate as to constitute an abuse of discretion.

2. Whether each major defendant's ownership of production, distribution and exhibition facilities, which operates to control access to the domestic market at strategic points, constitutes a vertical combination in violation of Sections 1 and 2 of the Sherman Act, in view of the separate power of each to exclude competitors and the sep-

[1] On the same date, this Court noted probable jurisdiction in the appeals filed by the defendants herein in Nos. 80, 81, 82, 83, and 84 (R. 3840). Consideration of jurisdiction to hear the appeals in Nos. 85 and 86 of persons who sought unsuccessfully to intervene below was postponed to the hearing of this case on the merits (R. 3841).

arate and collective continuing abuse of that power.

3. Whether the divorcement of the major defendants' exhibition interests from their distribution and production interests is required to prevent the resumption of the unreasonable restraints found below, to dissipate the effects of these restraints and to pry open the film market to independent exhibitors and distributors.

4. Whether the court below erred in directing that the illegality inherent in the joint ownership by defendants and independents of theatre interests be terminated through a purchase by one or the other, instead of requiring that the defendants' interest be sold to nondefendants.

5. Whether the common use of each other's affiliated theatre outlets by all of the major defendants should be prohibited as an independent means of terminating their conspiracy, as interim relief until divorcement can be accomplished, and as an incentive to expeditious divorcement by theatre divestiture.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. (15 U. S. C. 1.)

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor * * * (15 U. S. C. 2.)

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. 4.)

The Act of March 4, 1909, 35 Stat. 1075, 17 U. S. C. 1, provides in part as follows:

[Section 1.] That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

* * * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any

> manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;
>
> * * * * *

Article 1, Sec. 8 of the Federal Constitution provides in part as follows:

> The Congress shall have Power * * *
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *

The First Amendment to the Constitution provides in part as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

STATEMENT

I

PRIOR PROCEEDINGS IN THE CASE

The United States filed its original complaint in this case on July 20, 1938, and its amended and supplemental complaint on November 14, 1940 (R. 3137). The defendants named were five separate integrated groups of corporations (the major defendants),[2] each engaged in producing,

[2] The term "major defendants" is used in this brief as it was by the court below (Fdg. 56, R. 3670).

distributing, and exhibiting motion-picture films throughout the United States; two separate integrated groups of corporations, each engaged in producing and distributing motion-picture films; and one corporation engaged exclusively in distribution.

The complaint charged, among other things (R. 3137-3201): (a) that all eight defendants, as distributors, had engaged in a conspiracy to restrain and had restrained, had attempted to monopolize and had monopolized interstate trade in the production, distribution, and exhibition of motion pictures, by concertedly fixing minimum admission prices, clearances[3] and runs[4] for theatres, and also by concertedly engaging in numerous other unlawful practices, many of which discriminated against small independent[5] theatres and in favor of large circuits of theatres, including the circuits of the five major defendants; (b) that the five major defendants (all engaged in producing, distributing, and exhibiting) had engaged

[3] "The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres" (Fdg. 1; R. 3660).

[4] "The successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second run being the next subsequent, and so on" (Fdg. 1; R. 3660-3661).

[5] The term "independent" is used throughout this brief, as it was by the trial court (R. 3660), to refer to "A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant."

in a conspiracy to restrain and monopolize and had actually restrained and monopolized interstate trade in the exhibition of motion pictures in most of the larger cities of the United States; (c) that each of the five major defendants constituted a vertical combination of the business of producing and distributing on the one hand and exhibiting on the other, which in itself violated Sections 1 and 2 of the Sherman Act; and (d) that each distributor-defendant had entered into various contracts with theatre circuits, including the affiliated circuits of the five major defendants, and with exhibitors generally, which unreasonably restrained trade. The complaint prayed that the conspiracy among all the defendants be terminated, that defendants be enjoined from the numerous trade practices alleged to be illegal, and that each major defendant be compelled to divorce its exhibition business from its production and distribution business.

Before any evidence was heard, negotiations for settlement were undertaken. As a result, the amended and supplemental complaint of November 14, 1940, was filed, and a consent decree against the five major defendants only was entered on November 20, 1940 (R. 3373). The amended complaint brought up to date the allegations of the original complaint, but made no substantial changes in the character of the charges or of the relief prayed, except to request a nation-wide

system of arbitration tribunals to assist in securing adequate enforcement of prohibitions against illegal trade practices of nation-wide scope. Answers denying the charges of the amended complaint were filed by all defendants (R. 3201–3370), and the consent decree contained no admission of law violation and adjudicated no issue of fact or law except that the complaint stated a cause of action.

Pursuant to the amended prayer, the consent decree established an arbitration system (R. 3402–3413)[6] under which independent exhibitors could secure a hearing, before an arbitrator supplied by the American Arbitration Association, of complaints that unreasonable licensing restrictions of a specified character had been placed upon them by a consenting defendant as a film distributor. The decree provided for awards intended to limit the future conduct of the defendants in dealing with the complainant and his competitors, the awards being subject to review by an appeals board of three members appointed by the district court. Upon affirmance by the board or expiration of time for appeal, the awards became final and disobedience was punishable by contempt. Operations of the system were financed by the defendants, but supervised by the appeals board and the American Arbitration Association. The Department of Justice intervened in some of the

[6] The consent decree and rules of arbitration are printed in full and indexed in the Appendix to this brief, separately bound, at pp. 362–403.

proceedings and was kept fully advised as to all complaints, awards, and appeals.

The decree also provided that the consenting defendants' feature films could not be licensed before being trade-shown and could not be offered or licensed in groups of more than five at a time. It also prohibited the forcing of so-called short subjects, newsreels, reissues, westerns or foreigns by conditioning their sales upon sales of feature pictures. The only provision of the decree restricting the activities of the consenting defendants as theatre operators was a prohibition against their engaging in a general program of theatre expansion for a three-year period. There were no prohibitions restricting their conduct as producers.

The decree expressly reserved to the United States the right at the end of a three-year trial period to request the divorcement relief originally sought and still prayed for in the amended complaint. During that period, the Government was prohibited from seeking such relief in the instant or any other proceeding. The provisions concerning trade-showing and licensing features in blocks of five were binding upon the consenting defendants after the 1941-42 motion picture season only if the Government had by that time subjected the other defendants to the same relief.[7]

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[7] Although the Government did not procure such relief by the specified date, the major defendants continued to observe these provisions voluntarily.

The decree also provided that any party might move for any modification whatsoever after the expiration of the three-year period.

At the end of the three-year period the Government concluded, upon review of the consent decree's actual operation, that it was inadequate to correct the violations of law alleged in the complaint and that appropriate relief could not be obtained without a judicial finding of those violations. Accordingly, it moved for trial against all eight defendants on the issues made by the amended complaint and answers, and sought a preliminary injunction pending final judgment[*] (R. 3420). On June 13, 1945, an expediting certificate was filed (R. 3502). Beginning October 8, 1945, and concluding November 20, 1945, evidence was taken before an expediting court composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright.

At the trial, the Government abandoned its allegations that the defendants had monopolized film production by their activities as producers, but maintained that their distribution and exhibition monopolies had unreasonably restricted the economic opportunities of all independent producers,

[*] The motion for preliminary injunction was limited to a prohibition against the granting of unreasonable clearance (R. 3420–3421). It was argued and taken under advisement but was still undecided when the trial on the merits commenced.

and of course continued to assert the other allegations of unlawful conduct.

On June 11, 1946, an opinion by Circuit Judge Hand was rendered for the court (R. 3504). It held that the defendants individually and collectively had engaged in conspiracies and agreements in restraint of trade in the distribution and exhibition of motion pictures in violation of Section 1, and had attempted to monopolize such trade in violation of Section 2, but held that the defendants had not, either individually or collectively, [redacted] actually monopolized any part of trade in either the exhibition or distribution of pictures. On December 31, 1946, the court entered its findings of fact and conclusions of law (R. 3659–3694), and its decree (R. 3694–3702).

II

THE FACTS

Our attack on the action below is confined largely to the adequacy of the relief granted. We do not dispute any of what we consider to be the evidentiary findings, but we do challenge the court's failure to conclude that the defendants, both individually and collectively, had monopolized important segments of the motion picture industry. In this discussion of the facts, therefore, we shall rely largely on those found by the district court. In those instances in which we go beyond the findings in order to give a complete

picture, we shall refer only to facts about which we believe there is no dispute.

A. *The defendants.*—The five major defendants in this case are Paramount Pictures, Inc., (Paramount); Loew's Incorporated (Loew); Radio-Keith-Orpheum Corporation (RKO); Warner Bros. Pictures, Inc. (Warner); and Twentieth Century-Fox Film Corporation (Fox); and certain of their respective distribution and exhibition subsidiaries[9] (Fdg. 56, R. 3670). Each of these defendants is engaged either directly or through subsidiary or associated companies in the production, distribution, and exhibition of motion pictures throughout the United States.

The other three defendants are Columbia Pictures Corporation (Columbia) and Universal Corporation (Universal), and their respective

[9] The Paramount group of defendants includes: Paramount Pictures, Inc., engaged in producing, distributing and exhibiting motion pictures, either directly or through subsidiaries; Paramount Film Distributing Corporaton, a wholly owned subsidiary, engaged in distributing (Fdgs. 2, 3; R. 3661).

Loew is engaged in producing, distributing and exhibiting, either directly or through subsidiaries (Fdg. 12, R. 3663). No Loew subsidiary is named a defendant.

The RKO group of defendants includes: Radio-Keith-Orpheum Corporation, engaged in producing, distributing and exhibiting, either directly or through subsidiaries; RKO Radio Pictures, Inc., a wholly owned subsidiary, engaged in production and distribution; Keith-Albee-Orpheum Corporation, engaged in exhibition prior to its dissolution on September 29, 1944, and 99% of whose common stock and 33% of whose preferred stock was held by Radio-Keith-

subsidiaries;[10] and United Artists Corporation (United). Columbia and Universal are engaged directly or through subsidiary or associated companies in the production and distribution of motion pictures. United is engaged only in the distribution of motion pictures. None of these

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Orpheum Corporation; RKO Proctor Corporation, a wholly owned subsidiary, engaged in exhibiting; and RKO Midwest Corporation, a wholly owned subsidiary engaged in exhibiting (Fdgs. 13–17; R. 3663–3664).

The Warner group of defendants includes: Warner Bros. Pictures, Inc., engaged in producing, distributing and exhibiting, either directly or through subsidiaries; Vitagraph, Inc., a wholly owned subsidiary, engaged in distributing (on July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation); Warner Bros. Circuit Management Corporation, a wholly owned subsidiary, which acts as booking agent for the exhibition interests of Warner Bros. Pictures, Inc. (Fdgs. 24, 38, 39; R. 3665–3666).

The Fox group of defendants includes: Twentieth Century-Fox Film Corporation, engaged in producing, distributing and exhibiting, either directly or through subsidiaries; National Theatres Corporation, owned and controlled by, and a holding company for the theatre interests of, Twentieth Century-Fox Film Corporation (Fdgs. 40, 43; R. 3666–3667).

[10] The Columbia group of defendants includes: Columbia Pictures Corporation, engaged in producing and distributing motion pictures, either directly or through subsidiaries; Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary, engaged in distributing (Fdgs. 44, 46, R. 3667–68).

The Universal group of defendants includes: Universal Corporation, engaged in producing and distributing motion pictures, either directly or through subsidiaries; Universal Film Exchanges, Inc., a wholly owned subsidiary, engaged in distributing; Big U Film Exchange, Inc., a wholly owned subsidiary, engaged in distributing (Fdgs. 47, 49, 52, R. 3668–3669).

three defendants owns any theatres (Fdg. 58; R. 3670).

B. *The theatre acquisitions of the five major defendants.*—Prior to 1919, none of the defendants had combined the business of distributing with that of exhibiting pictures. In that year, Paramount decided to acquire "theatres of its own so that it might assure itself of outlets for Paramount productions" (Fdg. 8, R. 3662), and formed Southern Enterprises, Inc., which acquired various theatres in the south. At about the same time, Paramount also obtained a 50 percent interest in the Black chain of theatres in New England (Fdg. 8, R. 3662; Ex. 85, R. 197).

In 1920, Loew was a substantial theatre operator. At that time it acquired Metro Pictures Co., a producer and distributor. In 1924, Metro was merged with Goldwyn Pictures Co. and Mayer Pictures Co., both producers and distributors, to form Metro-Goldwyn-Mayer (Ex. 48, R. 181).

RKO was organized in 1928 by Radio Corporation of America. At the time of its organization it acquired production and distribution facilities through merger with another company, and also acquired interests in a number of companies operating circuits of vaudeville theatres (Fdgs. 18, 19, 21, R. 3664; Ex. 94, R. 203).

In 1925, Warner acquired its first theatre circuit (Ex. 116, R. 209). In 1928, Warner acquired the stock of the Stanley Company of America

which owned about 250 theatres situated principally in the Pennsylvania and New Jersey area (Fdgs. 27–29, R. 3665; Ex. 116, R. 209). In the next year and nine months, Warner acquired the stock of several other corporations owning circuits of theatres in the same general area and a smaller number of theatres scattered in various other parts of the country (Fdg. 30, R. 3665; Ex. 116, R. 209).

In 1925, Fox acquired its intial interest in theatres through the purchase of stock in corporations engaged in operating theatres (Ex. 45, R. 175). Since then, it has acquired additional theatre interests, some by acquisition from others and some by its own construction (Fdg. 42, R. 3667; Ex. 45, R. 175).

In 1929 and 1930, all of the major defendants except Loew acquired additional theatre circuits and emerged in 1930 in substantially their present form (Exs. 45, 85, 94, 116, R. 175, 197, 203, 209).

C. *The geographical pattern of the major defendants' theatre holdings.*—The exact location of all of the major defendants' theatres is shown at pp. 208–255 of the Appendix. These defendants operate theatres in 922 towns located in all 48 states and the District of Columbia. In Alabama, Arkansas, Florida, Maine, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, and Vermont, the only affiliated theatres are Paramount's. In Kansas, Montana, Nevada, and Wyoming, the only affiliated theatres are

those of Fox. In Idaho, Indiana, Kentucky, Michigan, New Mexico, Oklahoma, Virginia, and West Virginia, there are no towns in which two or more major defendants separately operate theatres.[11]

Thus of the total of 922 towns in which these defendants own theatre interests, there are 775 (84%) in which only one defendant has such interests. See App. pp. 208-255. In addition, there are 100 towns in which two or more defendants pool (*infra*, pp. 29-31) all or some of their theatre interests. There remain, therefore, only 47 towns in which the theatre interests of two or more majors are operated even in nominal competition with each other. A great part of these are cities of more than 100,000.[12] Even after the pooling arrangements are terminated, as directed by the district court (*infra*, p. 44), there will be only 60 towns, or 6 percent of the total of

[11] This geographical allocation is spelled out in more detail in Monograph 43, *The Motion Picture Industry—A Pattern of Control*, TNEC, pp. 15-16. See also Ex. RKO-11, R. 1764.

[12] The only towns of less than 100,000 in which this situation prevails are Phoenix and Tucson, Ariz. (Paramount and Fox), Santa Barbara, Calif. (Fox and Warner), New London, Conn. (Paramount and Warner), Sioux City, Ia., and Waterloo, Ia. (Paramount and RKO), Lynn, Mass (Paramount and Warner), Union City, N. J. (RKO and Warner), White Plains, N. Y. (Loew and RKO), Ambridge and Butler, Pa. (Paramount and Warner), Aberdeen and Hoquiam, Wash. (Fox and Warner) (App. pp. 208, 212, 214, 222, 226, 236, 238, 242, 252).

922 in which the major defendants own theatre interests, where they will be competing even nominally as exhibitors.[12a]

This situation prevails notwithstanding an expansion in the theatre interests of Paramount and Fox since 1935.[13] Their expansion, even when achieved through theatre corporations only 50% owned by them, has been subject to control at all times by the home offices of these companies (R. 886, 2102).

The lack of competition among the defendants in licensing films in towns where two or more of them have theatres operating in nominal opposition was demonstrated in concrete terms by evidence introduced by the Government describ-

[12a] Dissolution of pooling agreements between defendants in Cleveland, Ohio, Hammond, Indiana, Idaho Falls, Idaho, Lynchburg, Virginia, Minneapolis, Minnesota, Oak Park, Illinois, Philadelphia, Pa., Pittsburgh, Pa., St. Paul, Minn., San Antonio, Texas, San Francisco, California, Waterbury, Conn., and Yonkers, New York, would leave each party to the pool with one or more theatres in the town, in each of which towns there was no prior theatre competition between any defendants.

[13] See the following:

Year:	*Paramount*	*Fox*
1935	[1] 1,034	
1937	[1] 1,212	
Nov. 1938	[1] 1,440	[2] 561
1945 (approximate)	[3] 1,550	[4] 634

[1] Taken from Ex. 151, which "includes theatres that are owned but leased to other interests."

[2] Taken from Exs. 12 and 13, which include pooled interests.

[3] Taken from Goldenson's testimony (R. 824) which covered interests held through stock ownership of from 12½% to 100%.

[4] Taken from Ex. 160, which also includes pooled interests.

ing the precise manner in which the defendants licensed their product for first run. This evidence shows that, in the 92 cities of more than 100,000 population, during the period 1936–37 to 1943–44, the product of the defendant distributors continued to flow to the defendant exhibitors with virtually no shifts from one defendant exhibitor to another. On the other hand there were substantial changes as between the defendants' theatres and independents' theatres (Exs. 44, 58, 84, 95, 147, 195, 349, U-1; R. 175, 185, 196, 203, 235, 255, 239, 1406, 1834).[14]

The witness Rogers, sales manager of Loew's, conceded that there was no competition among

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[14] These admissions of fact which cover the seasons 1936–37, 1939–40, 1941–42, and 1943–44, respectively, show that during these seasons there were no shifts in the first run distribution of any defendants films from one affiliated outlet to another, except in the following instances:

Newark, N. J.—Beginning with the 1941–42 season, RKO, which had been selling its own (Skouras operated) theatre split its product between this theatre and Paramount and Warner.

Kansas City, Mo.—The Fox-Paramount-RKO pool, which played Fox, Paramount, RKO, Warner and Universal product first run, was dissolved at the end of the 1936–37 season. The distribution of the pool's first-run product thereafter was as follows: Warner to Paramount and RKO; Fox to Fox; Paramount to Paramount and RKO; RKO to RKO; Universal to Fox.

Des Moines, Iowa.—The RKO-Paramount pool which held all defendants' first-run contracts was dissolved during the 1939–40 season. The first run distribution of defendants' films thereafter was still confined to the RKO and Paramount theatres.

Providence, R. I.—In the season 1941–42, RKO split its

the major defendants' theatres in licensing the films he sold (R. 410, 572), and it is equally apparent that there was none among the major defendants' theatres in licensing the films distributed by any of them since such competition would have been utterly inconsistent with the general conspiracy to which these defendants were parties. (See *infra*, pp. 22–29.) No evidence was offered by any defendant to prove that any such competition among them occurred.

D. *The defendants' position in the industry.*—In the year 1945, the five major defendants had interests in 3,137 of the 18,076 motion-picture theatres in the United States, or about 17.35 percent.[15] (Fdg. 118, R. 3684). These 3,137 theatres, however, paid 45 percent of the total domestic film rental received by all eight distributor-defendants, as compared with the less than 5

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product between Loew's and RKO theatres but in 1943–44 season sold its own theatres exclusively.

Lowell, Mass.—Fox split its product for the 1936–37 season between Paramount and RKO but in 1939–40 and thereafter sold to Paramount only.

[15] The figure 3,137 includes both theatres owned by the five major defendants and theatres in which any one of those defendants held a joint interest with an independent exhibitor (see *infra*, p. 31), except where the interest of the defendant was an indirect minority stock interest. The total theatre interests of this nature held by each defendant are: Paramount, 1,395; Warner, 501; Loew, 135; Fox, 636; and RKO, 109. There are 361 more in which two or more of the defendants held joint interests with each other either through joint stock ownership or through lease or operating agreements (Fdg. 118, R. 3684).

percent of such rental paid by the five largest unaffiliated theatre circuits (Fdg. 126, R. 3685).

Most of these theatres are concentrated in the larger cities of the United States. The five major defendants together own interests in at least 70 percent of all the first-run theatres in the 92 cities of the United States having populations of over 100,000. They own interests in all of the first-run theatres in 38 of those cities.[16] (Fdg. 148, R. 3688). In ~~13~~ 15 more, their affiliates have a virtual monopoly of first-run theatres.[17] In

[16] The defendant Loew offered a list of first-run theatres in cities of over 100,000 which showed on its face that in the following 33 cities all such theatres were affiliated with one or more of the defendants: Albany, Rochester, Syracuse and Yonkers, N. Y.; Bridgeport and New Haven, Connecticut; Cleveland, Cincinnati, and Columbus, Ohio; Des Moines, Iowa; Dallas, Ft. Worth, Houston, and San Antonio, Tex.; Flint and Grand Rapids, Mich.; Minneapolis, Minn.; Milwaukee, Wis.; Elizabeth, Newark, and Paterson, N. J.; Chattanooga, Knoxville, and Memphis, Tenn.; Peoria, Ill.; Omaha, Nebr.; South Bend, Ind.; Charlotte, N. C.; and Lowell and Worcester, Mass. (App., pp. 327–338). The list contained theatres listed as independent first-runs in Boston, Chicago, Philadelphia, St. Paul, and Washington, D. C., which Exs. 428 and 428A (App., pp. 299–307) show have played only one or two of the pictures of any defendant during an entire year.

[17] In New Orleans and Los Angeles, the independents played a total of 27 and 10 films, respectively, of those released by the defendants. In Atlanta, Ga., Birmingham, Ala., Dayton, Ohio, Detroit, Mich., Denver, Colo., Jacksonville and Tampa, Fla., Salt Lake City, Utah, Seattle and Spokane, Wash., Somerville, Mass., Trenton, N. J., and Wilmington, Del., the independent theatres played the regular product of only one defendant distributor on first run (Exs. 428, 428A; App., pp. 299–307).

17 ~~23~~ others, the major defendants' affiliated theatres secured for first-run showing a major part of the product of the eight distributor-defendants.[18] (Exs. 428, 428A; App. pp. 299–307).

In cities of between 25,000 and 100,000 population, the major defendants own interests in 577 of a total of 978 first-run theatres, or almost 60 percent (Ex. 432; App. pp. 308–317). In 135 such cities, their affiliated theatres played all of the product of the eight distributor-defendants on first run.[19] And in at least 300 additional towns, most of them with populations under 25,000, an operator affiliated with one of the major defendants has all of the theatres in the town (Exs. 371, 397; R. 359–370, 2166).

The eight distributor-defendants comprise by far the most important distributors of motion pictures in the United States. In the 1943–44 season these defendants together distributed approximately 78 percent of the features ("Westerns" excluded) distributed by all national distributors in the United States (Fdg. 99, R. 3677).

These eight distributor-defendants received approximately 97 percent of the total film rental

[18] Of the remaining 21 ~~12~~ cities of over 100,000, the product of the eight distributor-defendants was about equally divided on first-run between affiliated and unaffiliated theatres in six ~~four~~ cities, unaffiliated theatres had the larger number of first-run theatres and secured more than half of the first-run product in 5 ~~four~~ more, and all of the first-run theatres are unaffiliated in the remaining four (Exs. 428, 428A; App., pp. 299–307).

[19] These cities are listed at R. 2355–2357.

paid by all the affiliated theatres during the 1943-44 season. From 71 to 81 percent of that rental went to the five major defendants as distributors, from 26 to 15 percent went to the other three distributor-defendants, and only from 2½ to 4½ percent went to independent distributors (Fdg. 127, R. 3685-86).

E. *The conspiracy to fix prices, clearances, and runs.*—In the distribution of copyrighted motion pictures, the right to exhibit is licensed rather than sold by the distributor to the exhibitor (Fdg. 61, R. 3670). In licensing features, each of the eight distributor-defendants has agreed with its respective licensees on the minimum admission prices to be charged in exhibiting its features (Fdg. 62, R. 3670). Each distributor-defendant also has followed the practice of including in its license contracts agreements that the distributor will neither exhibit nor grant to another a license to exhibit the pictures licensed for a specified number of days after the run licensed. "This so-called period of 'clearance' or 'protection' is stated in the various licenses in differing ways; in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; in terms of clearances as fixed by other distributors; or in terms of combinations of these formulae" (Fdg. 73, R. 2673). Clear-

ance is of course given to protect a particular run in a theatre over a subsequent run (Fdg. 83, R. 3674).

The price, clearance, and run provisions are all mutually interdependent. The run and clearance provisions together fix the relative playing positions of all theatres in a given area, and the minimum price provisions are based on playing position, the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on (Exs. 276, 278, 280, 282, 284, 286, 288, 290; App. pp. 1–18).

The pattern of exploitation of a first-class film in metropolitan centers is one in which the greatest film rental is derived from the first-run theatres and progressively lesser rentals are received from subsequent exhibitions (Exs. 467, 468, 469; App. pp. 280–285). The larger first-run film rental is of course a direct reflection of the proportionately greater box-office receipts of the first-run theatre resulting from the protection against competition of other theatres in the area which the run, clearance and minimum admission price provisions afford. In smaller towns, where fewer runs are sold, the first-run yields an even greater proportion of the total revenue from the town (Exs. F-21, F-21A; App. pp. 294–296).

All of the defendants, both distributor and exhibitor, have engaged in a conspiracy to fix the prices, runs, and clearances for substantially all

theatres throughout the United States, including the large number of important affiliated theatres (Fdgs. 64, 65, 81, 82, R. 3670–3671, 3674). This conspiracy has been effectuated mainly by means of film-licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors (Fdg. 64, R. 3670).

Each of the five major defendants as an exhibitor has been licensed by all of the other defendants as distributors at the fixed admission prices. The five major defendants have engaged in this nationwide system of price-fixing both by granting the price-fixing licenses as distributors and by accepting them as exhibitors; and the other three distributor-defendants have participated in the system by licensing the exhibitor-defendants at the fixed prices (Fdg. 69–71, R. 3672). The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors (Fdg. 64; R. 3670). In this way are controlled the prices to be charged for most of the feature motion pictures exhibited in the United States (Fdg. 65, R. 3671). The major defendants also have made operating agreements as exhibitors with each other and with independent exhibitors providing for joint operation of theatres at fixed minimum admission prices, demonstrating the express intent of these defendants to maintain artificial prices (Fdg. 67, R. 3671). And certain master

agreements and franchises between various defendants as distributors and other defendants as exhibitors stipulating minimum admission prices for large numbers of the defendants' theatres further indicate participation in the price-fixing scheme (Fdg. 68, R. 3671).

By agreeing to maintain the prices stipulated in the licenses, each exhibitor of any distributor's pictures consents to the price level at which he will compete with all other exhibitors of those pictures in his competitive area, whether they exhibit on the same or another run. The net effect of all the licenses of a distributor is to establish a price structure which regulates the competition between the various licensees of that distributor in each competitive area. Each exhibitor knows from the uniformity of price practices existing in the industry that the prices of all other exhibitors in his area are similarly controlled. Consequently, all licensees of each distributor are knowingly participating in the price-fixing system, and there is thus a conspiracy between each distributor-defendant individually and its licensees to fix minimum admission prices (Fdg. 71, R. 3672).

By means of the same types of agreements between the eight defendants as distributors and the five major defendants as exhibitors, all of the defendants have acted in concert in the formation of a uniform system of clearances and runs for the various theatres throughout the country

(Fdgs. 73, 81, 82, R. 3673, 3674). Some of their license agreements have granted clearance to all theatres then or thereafter owned or operated by a particular exhibitor as against all theatres in the competitive area then in operation or thereafter opened. The obvious purpose of such licenses was to give an advantage to the particular exhibitor over all competitors, without relation to the size, location or appointments of the competitive theatres (Fdg. 80, R. 3674). The major defendants "in numerous instances have maintained unreasonable clearances to the prejudice of independents" (Fdg. 79, R. 3674).

The net effect of this system of fixed prices, clearances and runs is that "a price structure is erected which regulates the licensees' ability to compete against one another in admission prices" (Fdg. 71, R. 3672).

An obvious purpose and result of this system was to increase the profits of the major defendants both as distributors and as exhibitors, and to produce greater profits for the nonexhibitor defendants in their capacity as distributors. "All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas" (Fdg. 66, R. 3671). The differentials in admission prices between first-run and later-run theatres in any competitive area are

calculated to encourage as many patrons as possible to see the picture at the first-run theatres where they will pay the higher prices. The greater the percentage of potential customers who can be persuaded to see the picture at higher-priced first-run theatres, the greater will be the gross revenue received from exhibition of the picture, which will of course be reflected in increased rentals to the distributors. "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible" (Fdg. 72; R. 3672–3673).

As a result of the control over both distribution and exhibition exercised by the defendants, the conspiracy has been so successful that "Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures" (Fdg. 84; R. 3674).

While the precise point at which this conspiracy originated cannot be accurately determined from the record, it is clear that it began some time after the entry of the major defendants into the exhibition field. An attempt was made by the defendants to show that licensing

restrictions of the same character as those on which the conspiracy rests had been used prior to the integration of the defendants. The defendant Paramount offered in evidence a series of license forms intended to show the evolution of the standard form from 1917 through 1945 (Exs. P-1, P-5-P-8, P-11, P-12, P-14-P-16; App. pp. 18-45). The development of the form of license, run and clearance provisions, admission-price-fixing provisions and provisions for auditing the exhibitor's receipts, as they appear in the exhibits, is shown in the Appendix, pp. 18-45. This evolution shows on its face a steadily widening control by the distributor over the exhibitor's business during the period 1923 to 1942.

The first of these licenses which granted rights in a film copyright (Ex. P-7) was the 1923 form (R. 926), which contained provisions for both a minimum admission price restriction and a protection or "run" clause. In 1926, a so-called "standard form" of license (Ex. P-8) was adopted by agreement among the defendant distributors (R. 925), which contained more detailed admission price and "protection" provisions, comparable to those in use for the past ten years. The witness Keough placed the initial use of clearance provisions which referred to the prices to be charged by theatres other than those which signed the license in question as around 1924, 1925 or 1926 (R. 943-944). There was also positive evidence that in at least one

area the system of fixing varying admission prices for competing theatres in accordance with their playing positions did not evolve until the principal theatre circuit there was acquired by one of the defendants.[20] The use of copyright restrictions in film licenses as a device for suppressing competition in this industry thus did not occur until after integration commenced, and it evolved into a more complete form of regulation of theatre operating competition as distributor-ownership of theatres increased.[21]

F. *Theatre "pooling" arrangements.*—The exhibitor-defendants have entered into many arrangements, both with each other and with independent exhibitors, for the pooling of theatres

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[20] The witness Rhoden, President of Fox Midwest Circuit, operating theatres in Kansas and Missouri, which were bought by Fox in 1929 (R. 2041), said, with respect to his company's operations in Kansas City, Mo.: "Prior to the 1935-36 motion picture season, the availabilities of subsequent run theatres in Kansas City, Missouri, and the surrounding territory were based upon admission prices. This general system of clearance based upon admission prices had existed in the area since approximately 1929" (R. 2061). The change made in 1935 gave Fox theatres exclusive rights to the first three runs in the town (R. 1215).

[21] The prior use by the original motion picture patent trust of patent license restrictions for the same purpose is disclosed in *United States* v. *Motion Pictures Patents Co.*, 225 Fed. 800 (E. D. Pa.), appeal dismissed, 247 U. S. 524, in which the United States secured an antitrust decree effectively dissolving that combination. It pooled patents essential to the operation of projection equipment and attempted to control

which otherwise would be competitive. These arrangements have been of three types. One form has been that of "operating agreements" under which "given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the 'pooled' theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages or otherwise" (Fdg. 112, R. 3682). Some of these agreements provide that the parties may not obtain additional theatres in the competitive area without first offering them to the pool (Ibid).

Another form of pooling arrangement has been "accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the 'pooled' theatres" (Fdg. 114, R. 3682). And a third form has been through joint ownership of theatres, or theatre-owning corporations. (Fdg. 115, R. 3682).

The number of theatres thus held jointly by each defendant is as follows (Fdg. 117, R. 3683, 3684):

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the market for films by requiring licensees of the projection equipment to use it exclusively for films licensed from them. Such a restriction was held illegal per se, in *Motion Picture Patents Co.* v. *Universal Film Company*, 243 U. S. 502, and the two decisions disposed of the patent licensing restriction techniques as a means of monopolizing the film business.

Theatres jointly owned or operated with independents:[1]	
Paramount	816
Warner	20
Fox	66
RKO	155
Loew	21
Total	1,078
Theatres jointly owned or operated by two defendants:	
Paramount-Fox	6
Paramount-Loew	14
Paramount-Warner	25
Paramount-RKO	150
Loew-RKO	3
Loew-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214
Grand total	1,292

[1] These figures exclude theatres in which either the defendant or the independent held an interest of 5% or less, the district court having treated such an interest as *de minimis* (Fdg. 115, R. 3683).

The necessary effect of all of these pooling arrangements is to eliminate competition. In the case of pooling by two defendants, "The result is to eliminate competition *pro tanto* both in exhibition and in distribution of features which flow almost automatically to the theatres in the earnings of which they have a joint interest" (Fdg. 112, R. 3682). In the case of pooling between a defendant and an independent, the effect is to eliminate competition in exhibition between the theatres involved and to combine their power in competition against theatres not in the pool (Fdg. 114, R. 3682).

G. ***Block-booking and blind-selling.***—For many years, the distributor-defendants, except United

Artists, licensed their copyrighted films in blocks of a year's releases before they had actually been produced. In such cases, the exhibitor knew nothing of the films he was buying, except the picture's title, plot, and players. In many cases, the exhibitor was forced to take licenses for all of the films in order to get any, although sometimes he was given a right to subsequent cancellation of a certain number of the pictures. The consent decree entered into by the five major defendants required them to trade-show their films before offering them for license, and limited to five the number which might be offered and licensed in any contract. These consent decree provisions on trade-showing and block-booking have lapsed, but the five consenting defendants have continued to observe them. Columbia and Universal have continued to license in annual blocks but have allowed the exhibitors considerable freedom in rejecting a percentage of the pictures (Fdg. 94, R. 3676). Both block-booking and blind-selling prevent exhibitors from bidding for individual pictures on their particular merits (Fdgs. 93, 97, R. 3676–3677).

H. *Master agreements.*—All of the distributor defendants have entered into master agreements with exhibitors covering the exhibition of features in a number of theatres, usually either an affiliated or an unaffiliated circuit. Under such license agreements, the circuits are allowed to allocate the film rental paid among the theatres as they

see fit, to exhibit the pictures on such runs and clearance as they deem best, and to decide upon other terms for exhibition (Fdg. 88, R. 3675).

I. *Formula deals.*—Paramount and RKO have entered into formula deals with circuits affiliated with Paramount.[22] In these deals, the license fee for a given feature to be paid by the theatres covered is determined by a specified percentage of the feature's national gross. The circuit may allocate film rentals, runs, and clearances among its various theatres as it sees fit (Fdg. 86, R. 3675).

J. *Franchises.*—Franchises are licensing agreements which cover the exhibition of all features released by a distributor during more than one motion picture season (Fdg. 1, R. 3660). All of the distributor-defendants have entered into some franchises with various exhibitors (Fdg. 89, R. 3675).

In the case of master agreements, formula deals and franchises, all of the theatres of a circuit are included in one agreement, and other theatre owners in the area are given no opportunity to bid for the features covered by the agreements.

K. *Other practices which discriminate against independents.*—The distributor-defendants have included in their contracts with the large affili-

[22] In one case (Ex. 419B, App. pp. 126–127) the circuit was one in which Paramount owned no stock but the films for which were bought by E. V. Richards (R. 2458), a Paramount officer (R. 2464).

ated and unaffiliated circuits numerous privileges which are not granted to the small independent exhibitors. These provisions are found most frequently in franchises and master agreements, which are made with the large affiliated and unaffiliated circuits. Small independents are usually licensed, however, upon the standard forms of contract, which do not include such privileges. "The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors" (Fdg. 110, R. 3681–3682).

III

THE TRIAL COURT'S CONCLUSIONS OF LAW

The district court's construction of Sections 1 and 2 of the Sherman Act and its application of those provisions to its evidentiary findings of fact is set forth both in its conclusions of law (R. 3691–3694) and in its opinion (R. 3504–3563). These legal conclusions of the court may be summarized as follows:

(1) *Price fixing:* All of the defendants, both distributor and exhibitor, have (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring with each other to fix uniform minimum theatre admission prices (R. 3516–3530, 3692–3693).

Each of the distributor-defendants also has (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring individually with its respective licensees to fix uniform minimum theatre admission prices (R. 3527-3530, 3692-3693).

The Copyright Act does not legalize defendants' price fixing because of the horizontal and vertical conspiracies (R. 3528-3529).

(2) *Clearance and run:* All of the defendants, both distributor and exhibitor, have (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area (R. 3530-3540, 3692-3693).

The court concluded, however, that an individual grant of clearance, when unaccompanied by price fixing and reasonable as to time and area, was essential in the distribution and exhibition of pictures and was lawful on the same principle that a vendor of property may covenant not to compete within a properly limited time and area (R. 3530-3534).

(3) *Theatre pooling arrangements:* Each exhibitor-defendant has unreasonably restrained trade in the distribution and exhibition of motion

pictures by joint operation (through operating agreements and profit-sharing leases) and joint ownership, both with each other and with independents, of normally competitive theatres (R. 3547–3549, 3693).

(4) *Other unlawful practices:* Each distributor-defendant has (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by: (1) agreeing individually with large affiliated and unaffiliated circuits to grant unreasonable clearance over theatres operated by their competitors (R. 3532–3533, 3693); (2) agreeing individually with such affiliated and unaffiliated circuits to grant numerous license privileges which discriminated against their exhibitor competitors (R. 3549–3551, 3692–3693); (3) entering into master agreements and franchises with such affiliated and unaffiliated circuits (R. 3540–3542, 3693); (4) blind-selling; and (5) block-booking[23] (R. 3542–3547, 3693). The court concluded that block-booking is unlawful because it conditions the licensing of one copyrighted film upon the acceptance of another, thereby preventing bidding for individual films on their merits and adding to the monopoly of one copyrighted picture that of another. The court also concluded that Paramount and RKO had similarly violated the Sher-

[23] United Artists is exempted from this conclusion, since the court found that it had never engaged in block-booking (Fdg. 95, R. 3676).

man Act by entering into formula deals (R. 3540-3541, 3693).

Each exhibitor-defendant has also unreasonably restrained trade in the distribution and exhibition of motion pictures by conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission prices, clearances, runs and other license terms (R. 3693).

(5) *Monopoly:* Despite the trial court's findings and conclusions that the defendants had conspired to restrain trade in the distribution and exhibition of motion pictures and had attempted by their conspiracy to monopolize such trade, it held that "The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553); and the court further held that even in the many cities where two or more of the major defendants control all or substantially all of the first-run theatres their interests could not be aggregated in considering whether a monopoly existed (R. 3552). With respect to those cities in which a single defendant owns all the first-run theatres, the court held that there was no unlawful monopoly because there was not sufficient proof that the monopoly position had been intentionally acquired rather than resulting from the inertness or inability of independent competitors (R. 3554). The court said nothing concerning the Government's claim of a collective distribution monopoly,

or its contention that each vertically integrated combination between a major distributor and its theatres violated both Sections 1 and 2. Consequently, the court failed to find that any of the defendants, individually or collectively, had monopolized any part of the industry in violation of Section 2 of the Sherman Act.

IV

THE DECREE

At the close of the case, the Government reiterated its request for complete divorcement of the major defendants' theatre interests from their distribution and production interests, and took the position that the form and extent of the relief against unlawful trade practices could not be determined until the basic divorcement issue had been decided. The court in its opinion, however, not only decided the issues of law violation but outlined in considerable detail the form of the decree to be entered (R. 3559-3563). The court stated that the decree should provide injunctions against all the unlawful conspiracies and agreements, such as horizontal and vertical price fixing; agreements on systems of run and clearance, and unreasonable clearance even when individually imposed; master agreements, franchises and formula deals; all other practices which discriminated against independents; block-booking and blind-selling; and pooling arrangements in the

form of operating agreements and profit-sharing leases. The opinion also stated that all joint ownership of theatres by two defendants, or by one defendant with an independent where the defendant's interest in any theatre was more than 5 percent and less than 95 percent, was to be terminated.

No divestiture of the major defendants' vast theatre holdings was to be ordered. The court recognized that mere injunctions against all the unlawful practices would not restore competition in the industry, and that some affirmative relief was necessary. But it concluded that the restraints existing in the industry did not lie in the "ownership of many or most of the best theatres by the producer-distributors," but in the unlawful practices, because if these practices were employed in favor of powerful independents, rather than the defendants, substantially the same undesirable results would follow (R. 3554-3555). Moreover, the court concluded that divestiture would "be injurious to the corporations concerned," and "damaging to the public" because "a new set of theatre owners * * * would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted * * *" (R. 3559, 3551). In lieu of divestiture and as "The only way competition may be introduced into the present system of fixed prices, clearances, and runs" (R. 3540), the court directed establishment of a competitive bid-

ding system under which each picture (except those which a distributor exhibited in its own theatres) was to be sold to the highest desirable bidder on a picture-by-picture and theatre-by-theatre basis. The court concluded (R. 3551): "We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting." The competitive bidding system had not been suggested or discussed by any of the parties.

The court, in its opinion, also directed that the joint theatre ownerships between a defendant and an independent could be dissolved either by purchase from or sale to the co-owner, or by sale to a nondefendant. Purchases of such interests by defendants were to be subject to court approval. Thus the defendants were permitted to acquire outright theatres in which their joint ownership with others had been held unlawful (R. 3561–3562). Except for acquisitions made in the process of dissolving the unlawful joint ownerships, each defendant was to be enjoined from expanding its theatre holdings (R. 3700).

Finally, the court rejected the Government's contention that clearance was unlawful *per se*, and concluded that clearance individually imposed and not "in excess of what is reasonably necessary to protect the licensees in the runs

awarded to them" was lawful, and should not be enjoined (R. 3559–3560, 3530–3534).

Proposed findings and judgments (R. 3596–3603, 3610–3635) were submitted by all parties and hearings thereon had on October 21, 22, and 24, 1946 (R. 2917–3099). Counsel representing various groups of independent exhibitors, heard as friends of the court, all objected to the competitive bidding provisions outlined in the court's opinion (R. 2811–2872). A ground common to all these objections was that the major defendants as theatre operators had such a tremendous advantage in financial resources and in their privilege of exhibiting their own pictures in their own theatres upon any terms they pleased that other exhibitors could not successfully compete with them.

Counsel for the principal independent producers in the industry were also heard as friends of the court. They contended that since they were dependent upon the distributor-defendants for profitable distribution of their films, the decree's restrictions on distribution practices would hurt them more than it would the major defendants, whose own theatre outlets remained unaffected by the restrictions (R. 2850–2861).

The court having ruled in its opinion against divorcement and the Government's contention that all clearance was unlawful *per se*, the Government proposed a judgment modifying that outlined in the opinion in the following principal respects:

(1) a provision prohibiting each major defendant from licensing films produced or distributed by it to another major defendant for use in its theatres for a ten-year period commencing one year after the entry of judgment was proposed (R. 3601); and (2) joint interests in theatres held by a defendant with an independent exhibitor were to be dissolved only by a sale of the defendant's interest to a nondefendant (R. 3600-3601).

On December 31, 1946, the court, rejecting both of the Government's proposals mentioned above, entered its judgment (R. 3694-3701) providing that:

All the distributor-defendants were enjoined from:

(1) Granting any licenses in any way fixing minimum theatre admission prices (R. 3695);

(2) Agreeing with each other or with any exhibitor or distributor to maintain a system of clearances (R. 3695);

(3) Granting any clearance between theatres not in substantial competition, or between theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted." When any clearance provision is attacked as not legal under the decree, however, the distributor shall have the burden of sustaining its legality (R. 3695-3696);

(4) Making or performing any master agreements, franchises or formula deals (R. 3696);

(5) Entering into any license in which the right to exhibit one feature is conditioned on the licensee's taking one or more other features (block-booking) (R. 3696);

(6) Refusing to extend to a licensee the right to reject 20 percent of features licensed prior to trade-showing, where any feature has not been trade-shown before the granting of a license for more than a single feature (R. 3696);

(7) Licensing a feature for exhibition in any theatre (other than its own) except by offering it at a minimum flat rental to the operator of each theatre in a competitive area who desires to exhibit it on any run. Within fifteen days, any such operator may submit a bid for the run he desires on a flat rental, percentage of gross receipts, or any other rental basis. The distributor may reject all offers, but any license granted must be to the highest "responsible" bidder on each run "having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." This method of licensing is not required in areas where there is no competition among theatres or in which no exhibitor makes an offer within the fifteen-day period. Each distributor's own theatres are exempt from this provision, and to those the distributor may license on any terms as to price, clearance, run, or otherwise that it chooses (R. 3696-3698).

All the defendant exhibitors were enjoined from:

(1) Making or performing any operating agreement with another defendant or with an independent exhibitor whereby two or more normally competitive theatres are operated collectively (R. 3698). All existing agreements of this kind are to be dissolved by July 1, 1947 (R. 3719). All agreements that newly acquired theatres in the area must be first offered to the pool are likewise enjoined (R. 3698–99).

(2) Making or performing any profit-sharing lease under which a defendant leases any theatre to another defendant or to an independent exhibitor in the same competitive area in return for a share of the profits (R. 3699). All existing profit-sharing leases are to be terminated by July 1, 1947 (R. 3719).

(3) Owning any interest in any theatre jointly with an independent (where the defendant's interest is greater than 5 percent and less than 95 percent) or with another defendant. Existing relationships of this kind between defendants and independents are to be terminated within two years either by the defendant's purchase of the other party's interest, by defendant's sale of his interest to the other party, or by sale to a non-defendant third party. Purchases by a defendant of an independent's or another defendent's interest are subject to approval of the court upon finding "that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." (R. 3699.)

(4) Expanding their theatre holdings in any manner except by acquisitions of joint interests as described above (R. 3700).

The decree expressly states that none of its provisions is to be construed to limit in any way the right of any distributor-defendant to license or otherwise provide for the exhibition of motion pictures distributed by it "in such manner, and upon such terms, and subject to such conditions" as it may choose in any theatre in which it has or may under the decree acquire an interest of 95 percent or more either directly or through subsidiaries (R. 3700).

The court in its opinion (R. 3562) had directed that the decree provide for arbitration of disputes as to bids, clearances, runs and similar controversies that would arise under its competitive bidding system and other provisions of the decree. The arbitration system was to apply only "to all parties who may consent to the creation of such tribunals for adjustment of such disputes" (R. 3562). The three nonexhibitor defendants, however, refused to agree to arbitration for any purpose and no agreement could be reached between the major defendants and the Government on the substantive provisions for the operation of such a system. Consequently, in its decree, the court provided for the liquidation of the arbitration system which had existed under the consent decree (R. 3700), but, in an accompanying memorandum stated (R. 3702):

"We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

All parties have appealed, and on April 7, 1947, this Court entered an order staying substantially all provisions of the judgment relating to motion picture licensing practices and the provision terminating the consent decree and liquidating the arbitration system, pending final disposition of these appeals.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

(1) In decreeing competitive bidding as appropriate relief (A. of E. 1, 10, 16, 18, 21, R. 3721–3723);

(2) In failing to prohibit the continued use by the major defendants of each other's theatres as exhibition outlets for each other's films (A. of E. 5, R. 3721);

(3) In failing to prohibit absolutely any further acquisitions of theatre interests by the major defendants (A. of E. 8, R. 3722);

(4) In failing to order ultimate divorcement of the distribution and production businesses of the major defendants from their theatre operations by divestiture of their theatre holdings (A. of E 2, 3, 6, 7, 17, 20, 23, 24, 25, R. 3721–3723).

SUMMARY OF ARGUMENT

I

Each of the five major defendants is a film producer and distributor which has a large theatre circuit composed of wholly and partially owned theatre corporations. These vertical combinations were formed in order to acquire an assured outlet for films. The eight distributor-defendants are the principal sources of feature films and the five major defendants the principal market outlets for films in the United States. No exhibitor can operate successfully without access to a substantial number of the films of the eight distributor defendants, and no producer or distributor can succeed without access to a substantial number of the affiliated theatres of the five majors. The distributor-defendants have habitually made unlawful copyright license agreements with exhibitors containing provisions designed to restrict theatre operating competition. Identical restrictions on any particular theatre have been imposed by all the distributor defendants, and this practice has been followed with respect to all theatres with which the defendants deal. They have thus conspired with one another to restrict competition among themselves and with other distributors. They have thereby erected and maintained a fixed run,

clearance and admission price system to which other distributors and exhibitors must conform to gain access to the market.

Thus, the five theatre owning defendants have a continuing power and established proclivity to discriminate in favor of each other as distributors and exhibitors. The major defendants' theatre circuits are so located geographically that there is little competition among them. In the limited areas in which theatres affiliated with one defendant are in nominal competition with theatres affiliated with another, actual competition among them in licensing films and fixing admission prices has been completely eliminated by the conspiracy. The same distributor's product habitually goes to the same affiliated outlet, and there has been little change in that pattern of distribution over the years. The defendants have also made express agreements with each other to pool specific theatres. They have made similar pooling agreements with independent theatre operators in other areas. They have also pooled theatre interests with each other and with independents over wide areas by pooling stockholdings in theatre corporations. These pooling arrangements were held illegal *per se* by the trial court. But the vertical integration and cross licensing are permitted to continue substantially unchanged.

The judgment below is inadequate to give the relief that the expediting court intended to grant.

That court recognized that affirmative relief was necessary. It recognized that it could have divorced the theatre business of these defendants from their distribution and production business so that economic incentives would induce future competition. It would have given such relief if it had followed existing judicial precedents dealing with similar abuses of such power. However, because of business hardship and a public inconvenience which the court mistakenly assumed such relief involved, the court instead decided first to try to compel future competition by regulating the film buying of 18,000 theatres. Such regulation was not sought by the Government and is opposed by those members of the industry whom it was intended to benefit.

The system of competitive bidding adopted for this purpose is wholly inadequate because competitive bidding can be no more than an empty gesture in an industry which must be non-competitive while vertical combinations exist. It is unenforceable because the defendants have considerable room for arbitrary exercise of discretion in determining the highest bidder and because no adequate enforcement machinery is available. Even if effectively enforced, the system would not prohibit the restrictions by which the defendants have illegally controlled the distribution of films in the past, even though some formal changes in the manner of their imposition are required by

the decree. Independents are now in such a weakened bidding position due in large part to the defendants' long continued unlawful conduct that they cannot successfully compete with the major defendants for films.

For more than twenty years, attempts to regulate the motion picture industry in order to protect independents against unreasonable license restrictions have been made. Yet, in 1946, the court below found the defendants still in illegal control of the industry. The failure of such past regulations shows that the decisive competitive weapon has not been a particular restrictive practice but the power, inherent in the integration of the defendants, to suppress and control competition. So long as this power continues, any form of license regulation is futile.

II

The only way in which the domestic film market can now be opened to competition is by divorcing the major defendants from their affiliated theatres. Acquisition and continued use of similar market control for a similar purpose by vertical combinations has always resulted in their dissolution in Sherman Act cases decided by this Court. In *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, the railroad was divested of anthracite coal mines which it had acquired to assure itself of the business of transporting and marketing their coal without competition

from other carriers. The continuing power to discriminate against competitors which was inherent in that combination was coupled there, as here, with an intent to use such power for that purpose. Such an intent was established there, and here, by a past record of illegal discrimination. Upon such a record, this Court ordered dissolution of that combination, notwithstanding a continuing power in the Interstate Commerce Commission to regulate such discrimination.

In *United States* v. *Swift & Co.*, 286 U. S. 106, a 1920 consent decree which took the five major meat packers out of the grocery and retail meat trade was before this Court. The district court had, in 1930, rescinded prohibitions against their engaging in the grocery business and against any use of their distribution facilities for handling the groceries of others because it thought the rise of integrated grocery chains in the intervening ten years had ended any threat of monopoly by the packers in this field. That decision was reversed by this Court, despite the fact that there was then active competition among all five packers, because the packers had control of meat distribution facilities which gave them individually a continuing power to suppress competition in the distribution of groceries, and which they had shown a proclivity to use for that purpose. This was regarded as sufficient basis for refusing to rescind prohibitions designed to terminate their power.

The conspiracy found below may not effectively be terminated without divorcement of the affiliated theatres. So long as the five majors retain their theatres and all eight distributor-defendants are allowed to enter into license agreements with them, the defendants can continue to use these non-competitive theatre outlets of the major defendants to bring about uniformity of restrictive provisions in their film licenses. Wherever such license agreements between the distributor and exhibitor defendants are made, they will have much the same competitive effect as the horizontal agreements by which the conspiracy found below has been maintained. While a prohibition like that which we seek against cross-licensing among the major defendants (see point III) would eliminate the conspiracy among those five defendants, it would not prevent each of them from entering into similar restrictive agreements with the three non-exhibitor defendants.

The required divorcement can in part be accomplished by compulsory sale to independents of the major defendants' interests in those theatre enterprises now owned jointly with independents. These joint interests were specifically found below to be illegally held, but the court below erred in permitting their termination by purchase by the defendants. Sale by the defendants is, we think, the obvious remedy for the illegality, and such divestiture is, moreover, required by *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

III

The five major defendants should, in any event, be prevented from using each other's theatres as outlets for each other's films. Their joint use of theatres to suppress competition by pooling agreements among their theatre subsidiaries was found to be illegal below and enjoined. Their continued joint use of each other's theatres has the same competitive effect when a license agreement between the distributing subsidiary of one and an exhibiting subsidiary of another is permitted. By prohibiting these defendants from dealing with each other, the film market will be partially opened to competition from both independent distributors and exhibitors. This prohibition would not, however, end the continuing discrimination inherent in the major defendants' use of their affiliated theatres as noncompetitive outlets for their own films and as outlets for the films of the three non-exhibitor distributors. While it would supply an incentive for the major defendants to compete with each other, their power, incentive and means to suppress the competition of independent exhibitors and distributors by licensing discriminations would continue. This prohibition is therefore only an interim measure which must be supplemented by divorcement to secure effective, permanent relief.

ARGUMENT

I

The remedy decreed below is so inadequate as to constitute an abuse of discretion

The district court found that the distributor-defendants are the eight dominant distributors of motion pictures in the United States. Together they distributed approximately 78 percent of all features (Westerns excluded) nationally distributed during the 1943–44 season (Fdg. 99, R. 3677).

Five of these defendants have entered the exhibition field on a large scale, primarily by purchasing theatre circuits from former independent operators (Fdgs. 8, 18, 19, 21, 27–29, 30, 42, R. 3662, 3664–3665, 3667). The trial court specifically found that Paramount had acquired its theatre interests for the purpose of assuring an outlet for its films (Fdg. 8, R. 3662), and it is undisputed in the record that the other four defendants acquired some or all of their theatre circuits for a similar purpose. In addition, these defendants have entered into numerous agreements among themselves and with independent exhibitors providing for the joint ownership and operation of theatres (Fdg. 117, R. 3683–3684). As a result, these five defendants in 1945 had interests in a total of 3,137 theatres in the United States (Fdg. 118, R. 3684).

These theatres are concentrated in the larger cities of the United States. The five defendants

own interests in at least 70 per cent of all first-run theatres in the 92 cities of the United States having a population of over 100,000 (Fdg. 148, R. 3688–89). In eight of those cities, corporations affiliated with one defendant own all the first-run theatres, in 30 others affiliates of two or more defendants own all the first-run houses (Fdgs. 147, 148, R. 3688–3689), and, in ~~15~~ 16 more, the defendants' affiliates have a virtual monopoly of first-run theatres (Exs. 428, 428A, App. 299–307). The defendants also own interests in almost 60 per cent of all first-run theatres in the approximately 300 towns of the United States having populations of between 25,000 and 100,000 (Ex. 432; App. 308–317). In 135 of those cities, their affiliated theatres played all of the product of the eight distributor defendants on first-run (R. 2355–2357). In more than 300 additional towns, most of them with populations under 25,000, an operator affiliated with one major defendant has all of the theatres showing all runs in each town (Exs. 371, 397 (R. 370, 2166); R. 359–370).

These theatre circuits are so located that there is practically no competition among them. Of the 922 towns in which the defendants own theatre interests there are 775 in which only one defendant has such interests. There are 100 additional towns in which two or more defendants have pooled their theatre interests. Thus there are at present only 47 towns (5%) in which the

theatre interests of two or more majors are operating in nominal competition with each other, and even if the pooling arrangements are terminated pursuant to the direction of the trial court, there will be only 60 such towns (6%).

In the light of this position of the defendants in the distribution and exhibition fields, it is apparent that no exhibitor can operate successfully without access to at least some of the product of the defendant distributors (Fdg. 151, R. 3689), and that no producer or distributor can succeed without doing business with the theatres of the five major defendants.[1] Having this power over both the distribution and exhibition of motion pictures, the defendants have engaged in a conspiracy to fix the prices, runs, and clearances for substantially all the theatres in the United States, their own as well as their competitors' (Fdgs. 64, 65, 81, 82, R. 3670–3671, 3674).

The conspiracy to fix runs was nothing more or less than an exclusionary conspiracy. It was an agreement among the eight distributor defendants as to which theatres they would license on first-run, which they would license on second-run, and so on. This agreement of course, accounts for the major defendants' great control over first-run exhibition in the larger cities. Each

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[1] From 35 to 50 percent of a feature film's total domestic gross comes from only 3 or 4 percent of its total domestic exhibitions. From 60 to 72 percent of these decisive exhibitions occur in affiliated theatres. See App. p. 279 and Exs. 433–440, printed at App. pp. 262–278.

of the defendants selected not only its own theatres but also those of the other defendants for first-run showings, and, by means of the conspiracy and their control over distribution, guaranteed those theatres dominion over the first-run field.

The conspiracy on prices and clearance was designed not only to eliminate price competition in the sale to the public of defendants' products, but also to protect the first-run theatres, encourage the maximum number of persons to patronize those theatres, and thereby increase the profits of defendants both as distributors and as exhibitors. The clearance agreements fixed the interval between runs so as to protect the first-run exhibitors from the competition of later runs and to persuade patrons to attend the first-run showings rather than wait for subsequent showings (Fdg. 83, R. 3674). By means of the price agreements, "a price structure is erected which regulates the licensees' ability to compete against one another in admission prices" (Fdg. 71, R. 3672). The range in prices between competing theatres was so fixed as "to give the prior-run exhibitors as near a monopoly of the patronage as possible" (Fdg. 72, R. 3672–3673).

The conspiracy has been extremely successful. While defendants' theatres comprise only a little over 17 percent of the total number of theatres in the United States, they have paid 45 percent of

the total domestic film rental received by all eight distributor defendants.[16] This contrasts with the less than 5 percent of such rental paid by the five largest unaffiliated theatre circuits. (Fdg. 126, R. 3685).

The eight distributor defendants, on the other hand, received approximately 97 percent of the total film rental paid by the affiliated theatres in the 1943-44 season, from 71 to 81 percent going to the five majors and from 26 to 15 percent going to the other three defendants (Fdg. 127, R. 3685).[2] By reason of their power and their conspiracy, the defendants have so controlled the industry that "Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs

[16] See Ex. 425, App. 258-259. A tabulation offered by Warner (Ex. W-4, App. pp. 360-361) shows that its percentage of film rental received from all affiliated theatres increased from 37.2 to 45.4% during the period 1935-44. This increase was achieved notwithstanding a decrease in the proportion of affiliated theatres to independent theatres in the domestic market during the same period. Compare affiliated expansion noted in note 13, p. 17, *supra*, with Fdg. 145, R. 3688.

[2] See Ex. 424, App. pp. 256-257. This control of the film revenue from these theatres has remained substantially unchanged during the past ten years, notwithstanding a substantial increase during the same period in the proportion of independently distributed films used by these theatres (see App. pp. 344-346, 348, 350, 353).

or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures" (Fdg. 84, R. 3674).

The district court recognized that the defendants had such extensive power to exclude others from the film market that mere injunctions against future practices would not be enough, and that some affirmative relief was necessary to eliminate the effects of the unlawful conduct and restore competition to the industry. Consequently, it adopted the competitive bidding plan as "The only way competition may be introduced into the present system of fixed prices, clearances and runs * * *" (R. 3540). It thought that this plan would bring an end to the noncompetitive price-fixing, run and clearance system (R. 3540), and enable independents to compete with the large affiliated circuits on a fair basis, even where the defendants now operate all of the first-run theatres (R. 3552–3553).

In our view, the district court plainly erred in concluding that the competitive bidding system would accomplish even the objectives which it recognized were necessary. We think that competitive bidding will neither end the unlawful practices nor permit independents to compete with the majors on a fair basis, and, moreover, that even if it were otherwise adequate in substance to accomplish those purposes, it will not do so because the system is procedurally unwork-

able. Consequently, we submit that the judgment below is so inadequate as to amount to an abuse of discretion.

A. THE COMPETITIVE BIDDING SYSTEM IS INEFFECTIVE TO ELIMINATE THE RESTRAINTS AND RESTORE COMPETITION

In equity proceedings brought by the United States under Section 4 of the Sherman Act, it is the authority and duty of the district court "to prevent" as well as to "restrain" violations of the Act. Accordingly, it is well established that the court must enter a decree which not only will end the illegal practices found to exist, but which will provide "such reasonable measures as would preclude their revival" (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *Local 167* v. *United States*, 291 U. S. 293, 299), and will "effectively pry open to competition a market that has been closed by defendants' illegal restraints". *International Salt Co., Inc.* v. *United States*, No. 46, October Term, 1947.

The decree below will not accomplish any of these purposes. Under that decree, the distributor-defendants remain as the largest distributors of pictures in the United States with control of the supply necessary to operate a theatre successfully. The five major defendants continue not only as the most important distributors, but also as the operators of by far the largest theatre cir-

cuits in the United States—the very relationship that the trial court found had been so persistently abused in the past. These major theatre circuits are so powerful, so concentrated in the larger cities, and so distributed geographically that no distributor can succeed without access to the market which they represent. Each defendant can continue to do business with the other defendants just as it has in the past, except that if an independent bids for pictures the majors' theatres must outbid him, and the defendants are enjoined from agreeing on minimum admission prices or imposing unreasonable clearance. They are expressly permitted, however, to grant such clearance "as is reasonably necessary to protect the licensee in the run granted." Each major also is explicitly allowed to continue to license all of its own product to its own theatres on any terms it chooses, even to the extent of discriminating against independents by any of the very means the lower court found generally unlawful. In fact, the only relief given to the independent is that he is allowed to bid against the five major defendants for pictures.

We think that this, in reality, is no affirmative relief at all, for the reason that the independents are in no position to compete with the majors for pictures, an inability in large part due to the defendants' unlawful conduct over the past years. We submit, therefore, that the competitive bidding system is fundamentally ineffective because

it does nothing to pry open to independent competition the market that has been so long closed by defendants' unlawful conduct.

The independent will be attempting to break into a monopolized field against powerful corporations backed by great wealth and resources. If these corporations want to prevent his entry into the field by outbidding him on pictures, there is no doubt of their ability to do so. In fact, it is likely that paying higher prices for the films would result in no injury to the majors for they would at the same time receive more as distributors.

The independent newcomer is competing with a company that makes a profit in both distribution and exhibition. If the affiliated company wants to undercut an independent exhibitor, it can operate its theatre at a loss, and still survive on its profits from production and distribution. In addition, the affiliated exhibitor has the great advantage of the assured supply of its own distributor's pictures. The independent has no assured supply and must compete with the affiliated exhibitor for the product of the other distributors. The affiliated exhibitor can use the profits from its assured product to out-bid the independent for the desirable films of other distributors needed to fill out its program. The independent's chances of securing adequate films through competitive bidding become progressively worse as

the number of affiliated companies having theatres in a particular town increases. If three of the majors have theatres in any one town the independent can compete with those three for the product of only the other five distributors.

And with respect to the picture supply tied to each major's affiliated theatres, that defendant is permitted by the decree to discriminate against independent exhibitors in any way it chooses. It can grant exceptionally long clearance or engage in any of the various other discriminatory practices which have been followed in the past and which the district court found generally unlawful.

Finally, in many cities it will be difficult, if not impossible, for the independents to obtain theatres. The majors will not, of course, sell their theatres to independent competitors. And it is not easy to build theatres, as the lower court suggested. The first-run downtown areas in most cities are built up with no available sites for construction of new theatres.

The competitive bidding system is also basically ineffective because it does nothing to eliminate the very inducements which gave rise to the unlawful conduct in the first place. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189–190. Since the affiliated circuits of the five majors remain by far the largest customers of the distributor-defendants, those distributors have the same economic incentive to

favor the majors' theatres wherever possible. Since the distributor-defendants continue as the most important sources of supply, the major defendants as exhibitors have the same economic incentive to favor those distributors. And there will, of course, be the continued inducement among the major defendants as both suppliers and customers of each other to continue to use their dual functions to cooperate rather than to compete with each other.

The terms of the competitive bidding system will themselves do much to bring these incentives into play. The decree provides that the distributor-defendants must offer each picture to all exhibitors in a competitive area, stating the minimum flat rental acceptable for a specified number of days of exhibition, the time when the picture will be available and the clearance which will be granted. Within 15 days, any exhibitor in the area may submit a bid stating the run desired, the amount he will pay on the basis of a flat rental, a percentage of gross receipts or any other rental basis he desires, the clearance he will accept and the days on which he wants to exhibit the picture. The distributor-defendant may reject all offers, but if it accepts any, it must grant the license on the run bid to the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to a licensor" (R. 3697).

These provisions give the distributor-defendants every opportunity to favor the large affiliated theatres. They can so combine the length-of-run and rental terms that the offer would be attractive only to a major's theatre. Moreover, it is highly unlikely that any two exhibitors would submit bids specifying the same exhibition dates, clearance and rental basis. The distributors have the authority to compare the imponderables listed in the decree and decide which of the bids is most desirable. The mere comparison of a flat rental bid with one specifying a percentage of gross receipts would be a highly discretionary matter. Also the distributors decide who is a "responsible bidder" and whether the bidder has an adequate theatre (R. 3697). With all of these decisions left to the distributor-defendants and with their powerful incentive to favor the large affiliated theatres, the independent is hardly in any better position than formerly to obtain pictures.

It becomes apparent, therefore, that the competitive bidding system will not introduce new independent competition into either the exhibition or the distribution field, will not even bring about competition among the defendants themselves, and as a result will do nothing to disturb the restrictive pattern of distribution and price-fixing created by the unlawful conspiracy.

In the many towns in which one or more of the defendants own all of the theatres or all first-run theatres, the situation will go on precisely the same as before. In those towns, there is no independent in a position to invoke the competitive bidding system. The decree expressly provides that operation of the system is not required in areas where there is no competition among theatres or in which no offer is made within 15 days after a picture is offered for bidding. With no independent to bid, there is no reason to assume that any of the majors' theatres will bid. Evidence introduced at the trial concerning the distribution of the defendants' pictures in the 92 cities of over 100,000 demonstrated that the pattern of first-run distribution among the majors' theatres remained virtually the same during the period 1936–37 to 1943–44. The defendants' witness Rogers, sales manager of Loew's, conceded that there was no competition among the majors' theatres in licensing the pictures he sold (R. 410, 572). No evidence was introduced by defendants to prove that any such competition among the majors' theatres existed. And, of course, any such competition would have been incompatible with the defendants' general conspiracy. It is apparent, therefore, that in such cities the major defendants would continue to get the same pic-

tures and runs as they did under the conspiracy and market them at the same prices.

The defendants are permitted also to extend whatever clearance "is reasonably necessary to protect the licensee in the run granted." Since by the very terms of the decree the reasonableness of clearance is to be measured by the protection required by the exhibitor, it follows that the length of clearance must depend on the amount of rental paid. The higher the rental paid by the exhibitor the greater is his need for protection over a subsequent run. The net effect of the clearance restriction, therefore, is that the exhibitor gets the amount of clearance it pays for. Consequently, the defendants' theatres can continue with substantially, if not precisely, the same clearance they formerly had.

While the decree prohibits price-fixing in the license agreements, clearance largely controls the ability to charge higher prices. By virtue of the clearance provision, therefore, the defendants will be permitted to maintain their prices as before. They cannot by their license agreements control the prices of independent subsequent-run houses, but, again, the possibility of competition from this source can be regulated through clearance provisions. If the subsequent-run houses reduce prices, the distributors can justify an increase in prior-run clearance, which would of course

largely dissuade any independent from taking such action.

The competitive bidding system is almost equally ineffective in the event an independent attempts to enter a town in which the defendants now own all theatres or all first-run theatres, or in a town in which there already is some minor independent competition. In such cases, the independent can invoke the competitive bidding system and at least force the defendants to go through the formality of bidding. But, undoubtedly, the majors will continue to do business with the same distributors as before and simply out-bid the independent, thereby preventing him from getting any pictures, or at least any more than he formerly had. Having the pictures, the major defendants can continue with their clearance over subsequent runs and maintain the same pattern of protection and price control as was created by the conspiracy.

It is for these very reasons that those the decree was intended to benefit oppose the competitive bidding system. The independent exhibitors have consistently objected that it will give them no relief because of the affiliated theatres' tremendous advantage in financial resources and their privilege of exhibiting their own pictures in their own theatres on any terms they please (R. 2870-2872). The principal independent producers have objected that the decree will not help

them because their access to the important segment of the market represented by the affiliated theatres will continue to be controlled by their competitors (Brief for Society of Independent Motion Picture Producers, pp. 16–21), and further that the decree actually adds injury by subjecting them to the same prohibitions as the defendants (since they are compelled by economic necessity to distribute through the defendants), while at the same time leaving the defendants free of those prohibitions in the operation of their own theatres (*Id.* at pp. 31–33). Even the non-exhibitor defendants contend that the decree puts them at a competitive disadvantage with the majors because they must put up all of their pictures for competitive bidding, while the majors have an assured outlet in their own houses in many important cities (Columbia Brief, pp. 66–68).

B. THE COMPETITIVE BIDDING SYSTEM IS UNWORKABLE

We further submit that, even if the substantive provisions of the competitive bidding system were effective to eliminate the evils found by the lower court, it would not be an adequate remedy because no adequate method for enforcement of this regulatory system either exists or is in prospect. All the disputes arising anywhere in the United States over the reasonableness of clearance, the fairness of distributors' offers, and the distribu-

tors' decisions on the best bid, the responsibility of the bidder and the adequacy of theatres, can be settled only in the Southern District of New York by way of contempt proceedings instituted by the Department of Justice. Neither the Department nor the court could handle all of the controversies that might arise if even a fair number of independents chose to pursue this remedy. The delays in decisions on such disputes obviously would be interminable. And even then the decisions would cover only the narrow issues of the individual controversies before the court and would not govern future conduct, except possibly in the case of controversies over the adequacy of theatres. Consequently, the independent would be required to come to the Department of Justice each time he thought he was being unfairly treated. In many cases moreover, the independent would be reluctant to follow this procedure for fear of antagonizing the distributors on whom he is dependent for supply. As this court said in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 190, "There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available."

By this decree the district court has assumed the burden of regulating the day-by-day business activities of over 18,000 theatres located through-

out the United States. The court recognized that its decree would hardly be workable without the aid of an arbitration system which it was not within its power to order. In its opinion, the court stated that the decree should provide for arbitration for all parties who would consent to such a system (R. 3562). And in its memorandum accompanying its decree it said: "We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree" (R. 3702).

There is, however, no chance for such a system. The refusal of the three non-exhibitor defendants to agree to the 1940 consent decree had demonstrated beyond any doubt that they were not prepared to submit to regulation of their trade practices in order that the industry's antitrust problems might be solved without disturbing the dominating position of their theatre owning competitors. They reiterated this refusal at the hearings preceding the entry of the judgment here under review. The Government's experience under the consent decree had convinced it that a permanent solution of the problem posed by this suit was not possible by consent. That was, of course, the basic reason for this trial.

C. EXTENSIVE EXPERIENCE SHOWS THAT NO JUDGMENT WHICH MERELY REGULATES DEFENDANTS' TRADE PRACTICES CAN GIVE ADEQUATE RELIEF

In no other industry have the dominant members been so often involved in antitrust litigation, so frequently found to have violated the Sherman Act, and so often subjected to injunctive relief against their trade practices.[3] This extensive past experience, involving both judicial and administrative proceedings, demonstrates with the certainty of a laboratory experiment that mere regulation of trade practices will not eliminate unreasonable restraints in this industry. It establishes that such restraints are inherent in the control of the five principal theatre circuits by

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[3] No specific reference will be made to pending antitrust proceedings against these defendants by private persons, of which there are many. A prospectus filed by Loew in July of 1947 with the Securities and Exchange Commission recites at p. 13:

"There are approximately 40 such private Anti-Trust suits now pending in which the Company and/or its subsidiaries are among the defendants. In such suits, with few exceptions, all the other so-called major distributors in the industry are also party defendants. In 2 of said actions only equitable relief by way of injunction or otherwise is sought. Most of these suits are for treble damages with or without injunctive relief. * * * *This type of litigation is common to the industry.*" [Italics supplied.]

A similar statement appears in a prospectus of May 1947, filed by Fox with the Commission. To the same effect are Universal Prospectus of March 1944, p. 24 (46 suits); Fox Prospectus of July 1943, p. 35 (49 suits); Columbia Prospectus of November 1935, pp. 6–7 (36 suits); RKO Prospectus of June 1944, p. 30–31 (46 suits).

the five principal film distributors and their use of each other's theatres as outlets for their films.

1. *Federal Trade Commission.*—The initial attempt of the Government to protect independent exhibitors was made in 1921. In that year, the Federal Trade Commission instituted an action against Famous Players-Lasky Corporation (predecessor of the defendant Paramount), Adolph Zukor and Jesse Lasky, its principal executives, and a number of theatre chains in which they had acquired substantial financial interests. After extended hearings, the Commission, on July 9, 1927, entered an order against Zukor, Lasky, and Famous Players-Lasky Corporation. The corporation and its two principal officers were ordered to cease and desist from (1) a general conspiracy to restrain trade in motion pictures as set forth in the findings, (2) employing block-booking in renting films to exhibitors, and (3) acquiring or threatening to acquire theatres with the purpose or effect of coercing exhibitors to play films produced or distributed by Famous Players-Lasky Corporation.[4] The conspiracy prohibited by paragraph 1 of the

[4] The following accurate prophesy of the ultimate result of such vertical integration appeared in an issue of the Annals of the American Academy of Political and Social Science, devoted to The Motion Picture, published in November 1926, Vol. CXXVIII, No. 217:

"The tendency toward consolidations and elimination of weaker concerns continues, and with it a tremendous growth

order was one in which the respondents had attempted to dominate the entire industry by first merging a group of film producers with the dominant film distributing corporation and then acquiring control of a series of theatre operating chains which were largely engaged in the operation of first run theatres.[a]

The Circuit Court of Appeals for the Second Circuit declined to grant the Commission's petition to enforce the block-booking provision in the Commission's order in the absence of a

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of the chain theatre movement, which was given important impetus by the First National combine and the Famous Players-Lasky counter movement. Every important producer-distributor combination is seeking to extend theatre controls and the investment of the motion picture in the theatre plant is climbing to new high totals. The exhibitor, the retailer chains, are eventually to control the production-distribution machinery, but in the process the masters of production-distribution are taking control of exhibition" (pp. 18–19).

In the November 1947 issue of the Annals, again entirely devoted to the motion picture industry, Charles Skouras, president of Fox West Coast Theatres Corporation noted that "some 2,700 theatres account for 55 to 60 percent of the revenue received by the motion picture producers" (p. 28), and Donald Nelson, president of the Society of Independent Motion Picture Producers, noted that (p. 56);

"The independents were forced to the painful realization that, no matter how well their pictures were made, they were not getting a fair chance to place them before the public. By a system of cross-licensing, under which one major studio would agree to show the pictures of another in theatres under its ownership or control, and by other trade methods which the Federal court has since held illegal, the large Hollywood

"finding that the respondent combined with other large producers for the purpose of hindering those outside the large combination". *Federal Trade Commission* v. *Paramount Fdmous-Lasky Corporation,* 57 F. 2d 152, 157. But that finding has been supplied by the court below and its absence in the *Paramount Famous-Lasky* case hardly justified Paramount's disregard of the unlitigated provisions of the Commission's order which both preceded and followed this decision. The Commission found that Paramount had interests in only 368 theatres in 1926 (11 F. T. C. 187, 209), whereas 20 years later it was in possession of approximately 1,400 such interests (Fdg. 118, R. 3684). These theatres were admittedly acquired for the purpose of relieving Paramount of the necessity of competing with other distributors in licensing its films. Even if it be assumed that the means of acquisition were

combines managed to acquire a monopolistic control over a vast part of the industry."

The vertically integrated combinations' monopoly of the industry is described in detail at pp. 125–136 of this issue of the Annals.

[5] The Commission found that first run theatres at that time yielded about 50 percent of the total film rental earned by any particular film. The record in this case shows that the restrictive practices used to channel revenue into first run theatres were being so successfully used 20 years later, that as much as 80 or 90 percent of the total film rental earned in large cities on a first-class picture comes from the first run theatres. See App. pp. 295–296.

different from those prohibited by the Commission's order, it seems clear that their trade restraining purpose was precisely the same.

In May 1925, the Federal Trade Commission instituted two proceedings charging West Coast Theatres, Inc. (which, with its subsidiaries, constituted a vertically integrated combination) and others with preventing independents from securing any films or securing films until they had lost their exhibition value (12 F. T. C. 383, 436). In August of that year, Fox acquired an interest in West Coast Theatres, Inc. (Ex. 45, R. 175). In May of 1929, the Commission made elaborate findings of restraints and monopolization, including the following (12 F. T. C., pp. 470, 480):

> Paragraph Thirteen. By purchase and construction of theatres, by contracts with competitors eliminating competition, by making partnerships with competitors, respondents West Coast Theatres, Inc., and West Coast Theatres, Inc., of Northern California, have steadily progressed from the time of the organization of the former to the time of the hearing in this proceeding toward domination of the motion picture theatre field in California. * * *
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> * * * * *
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> Paragraph Twenty-One. Because of extensive ownership and control of theatres in California by respondents, and because of common interests of respondents West

> Coast Theatres, Inc., and West Coast Theatres, Inc., of Northern California, with some of the producers and/or distributors doing business in California, respondents exert and have exerted great influence and power over the business of leasing motion picture films in that territory. Such power places these respondents in position either to give a producer and/or distributor a satisfactory business in the State of California, or to make it extremely difficult for the producer to find a satisfactory market in that territory for his motion picture films. Such influence and power has been used by respondents West Coast Theatres, Inc., West Coast Theatres, Inc., of Northern California, and T. & D. Jr. Enterprises, Inc., to prevent their competitors from securing films for their theatres which were desired by respondents, and to force producers and/or distributors by threats of boycott of their films, to refuse to lease films to their competitors, who had been customers of said producers and/or distributors for a long time, in certain cities and towns, and give said films to respondents for their theatres in said cities and towns.

The Commission ordered the respondents to cease and desist from interfering by the means theretofore used with the sale or lease of films to independent exhibitors (12 F. T. C. at pp. 433, 488). Subsequent litigation concerning similar

practices by these respondents is described in the ensuing paragraphs of this brief.[6]

2. *Government Sherman Act suits.*—Local actions against theatre circuits on the West Coast and in Chicago, in which the defendants here or their predecessors were joined, were instituted by the Government in 1928. *United States* v. *West Coast Theatres, Inc.*, S. D. Calif.;[7] *United States* v. *Balaban & Katz Corporation*, N. D. Ill.[8] The West Coast actions concerned the same circuit as was involved in the 1925 Federal Trade Commission proceedings mentioned above. Criminal informations, indictments, and petitions in equity were filed; the essence of the charges in all was that the defendants had conspired to exclude independent exhibitors from contracting for films on early runs. The ensuing proceedings were protracted and, in California, for example, during the pendency of the proceedings, a uniform zoning and clearance schedule was adopted by the defendants and others, giving rise to a new suit

[6] As shown by the findings here, maximum interference with the independents' right to secure films was ultimately achieved through copyright license restrictions rather than by a sale or lease of any film. *Supra*, pp. 27–29 and App. pp. 18–45.

[7] Criminal information (No. 4902–M) filed September 28, 1928; indictment (No. 9663) filed April 19, 1929; petition in equity (S–10–C) filed August 21, 1930; petition in equity (Y–38–H) filed November 16, 1932; contempt information (No. 14048–C) filed August 31, 1939.

[8] Petition in equity (Eq. No. 8854) filed December 15, 1928; contempt information (Cr. No. 31230) filed November 9, 1938.

in equity charging the illegality of such a schedule. The years passed, consent decrees were entered, and contempt proceedings were brought, but little more can be said to have been accomplished than an ultimate supersedure of those decrees by the 1940 consent decree entered in the instant case.[9] For the California and Chicago courts had sought mainly to control the form of agreement used to accomplish an unlawful result, only to be met by new and different forms which enabled the defendants to attain the same ends.

Suits against the defendants or their predecessors involving their nation-wide distribution activities bore little more fruit. Two such suits were instituted by the Government in April 1928. In one of these, it was charged that the de-

[9] In a report filed May 1, 1940, a Special Master hearing the contempt case found that the contracts made between Balaban & Katz and the defendant distributors Fox, Loew, Paramount, and Warner gave Balaban & Katz the selective first choice of the best pictures released by each one of them and that by reason of these contracts, the independent exhibitors in the loop district of Chicago were unable to exhibit pictures suitable for first-run exhibition. The Master recommended that Barney Balaban, Balaban & Katz Corporation, B & K Management Corporation, and Paramount be found guilty of violation of paragraph 10 of the consent decree, a general provision against monopolization in the terms of section 2 of the Sherman Act, and that none of the defendants be found guilty violating the more specific provisions of the decree that they had also been charged with violating. Subsequently the Master reversed his recommendation as to Barney Balaban. On December 10, 1940, fines were imposed against Balaban & Katz Corporation, B & K Management Corporation, and Paramount upon pleas of nolo contendere, and the information was dismissed as to the other defendants.

fendants had agreed upon a uniform licensing contract and had concertedly refused to license pictures to independent exhibitors who refused to execute the agreement. This standard form contract provided for the submission of any dispute which might arise under the contract to a board of arbitration, in the selection of which the distributors had a dominant voice. In the other suit, the defendants were charged with concertedly refusing to license pictures to independent purchasers of motion-picture theatres who refused to assume contracts for films entered into by the previous owners of the theatres. Each of these restrictive provisions was administered through local Film Boards of Trade. The Government prevailed in both of these suits. *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44.

The local Film Boards of Trade which administered the arbitration and assumption of contract provisions found unlawful in those cases also established uniform clearance schedules. This latter phase of their activity was subsequently disclosed in *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D. Neb.), which found the uniform clearance schedule there involved to be a violation of the Sherman Act. That schedule was the product of express agreement among the distributors and only that mode of establishing such schedules was enjoined. The

terms of that schedule were somewhat more favorable to the independent theatres in Omaha than the schedules in force there at the time this suit was tried, which were established by separate ~~express agreements between~~ the first run exhibitor, a Paramount affiliate, and the distributor defendants.[10]

On December 15, 1936, the Government filed a suit at Dallas, Texas, against Paramount, a large theatre circuit affiliated with it, and against the other seven distributor-defendants here. It

[10] Uniform clearance for the first run theatres in Omaha, Nebraska, as of July 22, 1930, established by the Omaha Film Board of Trade, as reported at page 539 of the above case, was as follows:

"RUNS AND PROTECTION

"Paramount, World and Orpheum, Omaha, maximum protection in the City of Omaha after the last day of exhibition over all subsequent run as follows:

38 days over theatres charging admission of 35¢.
42 days over theatres charging admission of 30¢.
56 days over theatres charging admission of 25¢.
77 days over theatres charging admission of 20¢.
98 days over theatres charging admission of 15¢.
120 days over theatres charging admission of 10¢.

* * * * *

"Paramount, World and Orpheum, Omaha, maximum protection after the last day of exhibition, thirty (30) days over Strand, Broadway and Liberty, Council Bluffs. Seven (7) days additional for each five cents (5¢) less charged in admission.

* * * * *

"Paramount, World and Orpheum, Omaha maximum protection after the last day of exhibition as follows:

"28 days over theatres located within the radius of from 1 to 25 miles of Omaha.

charged that all of these defendants had violated the Sherman Act by agreements which prevented independent exhibitors in competition with the

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"7 days over theatres located within a radius of from 25 to 35 miles of Omaha."

Clearance of first run theatres in Omaha, during the 1943-44 motion picture season as set forth in a letter of June 7, 1944 from Tri-States Theatres Corporation, 50% owned by Paramount, to Paramount Film Distributing Corp., is as follows:

"Set forth herein below is a schedule for the town of Omaha, Nebraska showing the first run clearance which has finally been agreed upon after negotiations and discussion between us.

"The clearance set forth herein will go into effect and apply in respect of all of your 1943-44 photoplays which we or our affiliates have contracted or which we or our affiliates may hereinafter contract to exhibit.

"Orpheum, Paramount, and Omaha Theatres—1st Run

60 days over second run, Omaha, Nebr.
28 days over Council Bluffs, Iowa
28 days over Arlington, Nebr.
28 days over Blair, Nebr.
28 days over Elkhorn, Nebr.
28 days over Gretna, Nebr.
28 days over Louisville, Nebr.
28 days over Plattsmouth, Nebr.
28 days over Springfield, Nebr.
28 days over Valley, Nebr.
28 days over Waterloo, Nebr.
28 days over Glenwood, Iowa
28 days over Neola, Iowa
28 days over Treynor, Iowa
7 days over Murray, Iowa
7 days over Fremont, Nebr.
7 days over Nehawka, Nebr.
7 days over Weeping Water, Nebr.
7 days over Ashland, Nebr.
7 days over Elmwood, Nebr.
7 days over Herman, Nebr.
7 days over Union, Nebr.
7 days over Logan, Iowa
7 days over Carson, Iowa
7 days over Malvern, Iowa
7 days over Minden, Iowa
7 days over Medale, Iowa
7 days over Missouri Valley, Iowa
7 days over Mondamin, Iowa
7 days over Oakland, Iowa
7 days over Persia, Iowa
7 days over Shelby, Iowa
7 days over Thurman, Iowa

circuit in subsequent-run situations from exhibiting at an admission price of less than 25 cents pictures which had been shown in the circuit's first-run theatres at a 40-cent admission price. The Government also charged that they had made agreements which provided that any feature shown first-run in the circuit's theatres with an admission price of 40 cents or more could not be shown on a double feature bill in a subsequent run theatre. The district court found that these restrictions had injured the business of the independent subsequent run houses and adversely affected the public in these areas by increasing admission prices at their theatres, most of which had been accustomed to charging 15 cents instead of 25 cents (*United States* v. *Interstate Circuit*, 20 F. Supp. 868 (N. D. Tex.)). It entered a decree enjoining each of the distributor defendants from making any agreements with the exhibitor defendants which granted the restrictions referred to above. This Court, on appeal, held the restraints involved illegal and affirmed the district

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"Please signify your understanding and agreement hereto by signing in the space indicated below and kindly return one copy to the writer" (Ex. 82, Omaha; R. 196).

The clearance granted by Fox (Ex. 42, Omaha; R. 173) and Loew (Ex. 57–28; R. 185) in first-run Omaha contracts with Tri-States for the same season was identical with that stated above except that the clearance over Plattsmouth, Nebr., was 14 days instead of 28 for each of these distributors and neither of them included the towns of Glenwood and Logan, Iowa, in their schedules.

court's decree. *Interstate Circuit* v. *United States,* 306 U. S. 208.

In the instant case, the Government introduced in evidence the contract between Universal and Interstate Circuit found illegal in the *Interstate* case (Ex. 198, App. 86), together with the 1941–1944 franchise contract between Universal and Interstate Circuit (Ex. 261, App. 50–57). The latter agreement omitted the prohibited clearance restrictions, but gave the circuit just as many prior runs and a greater control over availability of Universal films to its competitors than it had before. That contract established a blanket weekly rental of $5,000 for all features, shorts, serials and news used on all runs. The amount of the rental was subject to "review and revision" in accordance with actual performance, and the net effect of the deal was simply to make Interstate Circuit the "chosen instrument" of the distributor for exploiting this territory on a virtual partnership basis.

Despite the interdiction of the *Interstate* and *Perelman*[11] cases against restrictions upon double featuring, Columbia (Ex. 139, R. 228), Paramount (Ex. 82, R. 196), Fox (Ex. 42, R. 173),

[11] In 1938, the Third Circuit Court of Appeals found the five major defendants guilty of combining to prevent independent theatre operators in Philadelphia from playing double features. *Vitagraph, Inc.* v. *Perelman*, 95 F. 2d 142, certiorari denied, 305 U. S. 610. This opinion, as well as that of the trial court, 9 F. Supp. 729 (E. D. Pa.), contains a valuable analysis of the defendants' tendency to present a united front against independent competition.

RKO (Ex. 94, R. 203), Universal (Ex. 365, R. 346), and Warner (Exs. 126–128, R. 221–222) have been giving the distributor-exhibitor theatres in Cleveland, Ohio, a clearance over subsequent runs graduated in length according to the admission price and double feature policy of the latter. For instance, Paramount's clearance in 1943–44 in Cleveland was 35 days over subsequent run single bill theatres and 63 days over subsequent run double bill theatres. Other examples of this sort of restriction taken from answers to interrogatories are: Universal (Ex. 365, R. 346); RKO in Sioux City, Iowa (Ex. 94, R. 203); Fox in Lakewood, Ohio (Ex. 42, R. 173); Paramount in Fort Worth, Texas (Ex. 82, R .196).

3. *NRA Code and 1940 consent decree.*—The regulation of trade practices as a method of eliminating restraints from the industry and affording independents and the public alike the protection of the Sherman Act does not become more effective when implemented by a nation-wide administrative enforcement system. That we believe is amply demonstrated by the experience under the NRA and the 1940 consent decree. The Code of Fair Competition for the Motion Picture Industry (NRA Code No. 124) became effective on December 7, 1933, and expired in May 1935. This Code attempted to regulate only unfair trade practices. To administer the Code, two sets of local boards were set up throughout the country: Local Clearance and Zoning

Boards, which had authority to establish uniform schedules fixing the playing positions of all theatres in local competitive areas, and Local Grievance Boards, which heard unfair practice complaints of individual exhibitors. While these boards heard a substantial number of complaints, the most that can be said of their decisions is that they tended to palliate the effects of discriminations implicit in continued control of large theatre circuits by film distributors.[12] The Boards' membership generally consisted of representatives of distributors, first run exhibitors, and later run exhibitors, and, since the first run exhibitors were more often than not affiliates of the distributors, it is not surprising that patterns of discrimination are found in the uniform clearance and zoning schedules established pursuant to NRA authority. That these discriminatory patterns still persist is pointed out in a consent decree Appeal Board decision of 1944 (App. 428, 430).

While the consent decree entered in this case in 1940 established an efficient and impartial arbitration system, even its effect has been merely to mitigate the discriminations inherent in the major defendants' ownership of theatres. See App. pp. xi, xii, 403–446. The trial court's finding that the Government was entitled to new affirmative relief is itself a finding that the consent decree was inadequate to end the violations

[12] See Bertrand, *The Motion Picture Industry*, NRA Work Materials No 34, Industry Studies Section, 1936, p. 79; *Darrow Board Report of May 1934.*

found. And private antitrust litigation against the defendants during the period of operation of the consent decree confirms this conclusion.

4. *Private Sherman Act suits.*—During the foregoing period of regulation under the consent decree, all of the distributor defendants have been found guilty in private antitrust suits of combining in a united front against independent exhibitors who sought to compete with them. In Chicago, all of the major defendants were found guilty of jointly maintaining a discriminatory admission price, run and clearance structure in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; 162 F. 2d 520, certiorari denied November 10, 1947, No. 394, this Term. The injunction granted by the district court prohibits Paramount from playing its own films in the Balaban & Katz (98% owned by Paramount) first-run theatres in downtown Chicago for more than two successive weeks. These were the same theatres that were involved in the Master's findings, *supra*, p. 79, note 9. In 1945, all of the defendants here were found guilty of illegally protecting Warner's first-run monopoly in Philadelphia in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. C. A. 3). Pursuant to this decision, the district court entered an injunction compelling Warner to extend to the complainant the right to bid for first-run exhibition of Warner films in Philadelphia, although Warner operates first-run theatres there. The most recent

finding of Sherman Act violation by these defendants is that of *Theatre Investment Co.* v. *RKO Radio Pictures, Inc.*, 72 F. Supp. 650 (W. D. Wash.), decided in 1947, where the court found all of the distributor defendants here and a circuit affiliated with Fox guilty of restricting independent theatre competition in Seattle, Washington. While these private Sherman Act suits have given some relief to the particular complainants there involved, they cannot, of course, solve the problem posed here of restoring and protecting competition for the benefit of the public. All independents, including these complainants, are still faced with the ever-recurring discriminations not anticipated by their injunctions which are inherent in the integrated structure of the major defendants.

5. *Conclusion.*—The history above set out teaches that the ultimate solution to the problems raised by the defendants' pervasive economic power over the distribution and exhibition of motion pictures is not to be found in a new regulatory scheme. The only appropriate relief in this case at this time is relief which will terminate this conspiracy for all time and will open to future competition a film market long closed to such competition by the defendants' unlawful conduct.

In now offering its competitive bidding system as a substitute for divorcement, the court's opin-

ion suggests that, if this system fails to work after a trial period, divorcement may still be decreed (R. 3551). But the district court was not writing on a clean slate. If its judgment offered real hope of solving any of the basic problems that its opinion raises, this would be a welcome experiment. But the impossibility of effective administration, the opposition of those it is intended to benefit, and its resemblance in impact and method to past systems of regulation which have already been tried and found wanting, deprives the lower Court's system of any value, even as a tentative approach to solving these problems. Its system of regulation would therefore have to be rejected even if there were no judicial precedents for dealing with these problems by the remedies sought by the Government. The following argument will show that both prohibition of cross licensing among the major defendants and ultimate divestiture of their theatres are now required to open the domestic film market to competition at both the exhibition and distribution levels. We shall also show that such relief is the kind held appropriate by decisions of this Court. This Court has never sanctioned mere regulation of a vertical combination which has persistently abused its continuing power to discriminate against independents.

II

The district court should have ordered ultimate divorcement of the distribution and production businesses of the major defendants from their theatre operations by divestiture of their theatre holdings

A. EACH INTEGRATED VERTICAL COMBINATION BETWEEN A MAJOR DEFENDANT'S PRODUCING AND DISTRIBUTING BUSINESS AND ITS AFFILIATED THEATRES CONSTITUTES A RESTRAINT AND A MONOPOLIZATION OF AN APPRECIABLE SEGMENT OF TRADE WHICH CAN BE REMEDIED ONLY BY DIVORCEMENT

The Government has consistently maintained that each integrated combination between a major distributor and its affiliated theatres constitutes a restraint and a monopolization of an appreciable segment of trade in violation of both Sections 1 and 2 of the Sherman Act, and that this amounts to a continuing unlawful condition which can be corrected only by theatre divestiture. The opinion of the trial court is silent with respect to this point, except for the statement that (R. 3555): "The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition." The findings of fact and conclusions of law add nothing explicit in this connection.

It is not our contention that each major defendant has a national monopoly of distribution, or that its film product alone would give its theatres a national monopoly of exhibition. We contend that each vertical affiliation between a major dis-

tributor and its theatres necessarily results in a continuing restraint and monopolization with respect to that important segment of trade represented by the pictures it distributes to its own theatres.

Most of the major defendants' vast theatre holdings were acquired through purchase of assets or stock in, or merger with, independent theatre enterprises (Fdgs. 8, 21, 28–30, 42; R. 3662, 3664, 3665, 3667). The trial court specifically found that Paramount's theatre interests were acquired "so that it might assure itself of outlets for Paramount productions" (Fdg. 8, R. 3662). It is undisputed in the record that the other four major defendants also integrated theatre operations with film distribution in order to have non-competitive market outlets for their films. It is clear, therefore, that such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution. They were in each case a deliberate creation of a market control which would assure them of retail outlets regardless of the merits of their product.

The necessary consequence of these several affiliations is arbitrarily to tie the pictures of each major defendant to its own theatres, and conversely to tie those theatres arbitrarily to the pictures of the major defendant. Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion

picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor, all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres. As the defendants' witness Rathvon, president of RKO, frankly stated with reference to his company's ownership of key first-run theatres:

> * * * if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution * * * it gives you a chance to get some revenue back because you forced it into the flow of distribution (R. 1622).

This Court has consistently held that combinations vertically integrated to secure arbitrary market control violate the Sherman Act. *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Reading Co.*, 253 U. S, 26;[1] Cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218. They constitute an unreasonable restraint, an attempt to monopolize, and an actual monopoliza-

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[1] The first *Reading* decision (226 U. S. 324) merely voided certain price maintenance contracts, leaving intact certain integrated rail and mine combinations, but in the second *Reading* decision, cited above, the Court found that elimination of the price maintenance agreements had not been adequate relief and dissolved the principal integrated combinations.

tion of a part of trade because "the mere existence of such a combination and the power acquired" thereby "constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." *United States* v. *Reading Co., supra,* at p. 58.

The *Lehigh Valley* case is almost precisely like the instant one. There, several railroads competed for the business of transporting coal from certain Pennsylvania anthracite mines to the eastern markets. The Lehigh Valley Railroad Company entered upon a policy of acquiring coal lands tributary to its lines by purchasing and leasing such lands, and by acquiring stock in corporations owning such lands. It organized a coal company to hold title to the acquired coal lands and stock. Later it organized a sales company to act as selling agent for the coal company. At the time the suit was brought, the railroad company had gained control of the transportation and sale of most of the coal derived from lands tributary to its lines. This amounted to about 20 percent of all anthracite coal produced, and the coal mined by the railroad company and its subsidiaries was something less than that. The largest single purchase, that of Cox Brothers, resulted in discontinuing the latter's connections with the other carriers and exclusive carriage of its coal by the Lehigh. This Court held that the railroad's de-

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liberate purchase of the coal lands for the purpose of arbitrarily controlling the transportation and sale of coal derived from those lands amounted to a restraint of trade, an attempt to monopolize and an actual monopolization of a part of the transportation and sale of anthracite coal in violation of the Sherman Act. It directed divorcement of the railroad company, the coal company and the sales company so that each would be entirely independent of the others. The railroad company and its coal producing and selling subsidiaries had no monopoly of the transportation or sale of all anthracite coal, and this Court did not mention the effect upon the national coal market of the railroad company's control of 20 percent of all anthracite coal produced. The vertical combination was held unlawful because the railroad's acquisitions of coal lands were for the purpose of eliminating competition for the transportation of coal mined from those lands, and this amounted to a restraint and a monopolization of an appreciable segment of commerce. The continuing inducement to rate discrimination provided by such a combination was thought to have serious enough consequences to warrant divestiture relief, even though the Interstate Commerce Commission had continuing power to control such discrimination by appropriate regulatory action.

The illegality of the integrated vertical combinations in the case at bar is further confirmed by the numerous decisions of this Court condemning

similar restraints when accomplished by a conspiracy between two or more parties. *Associated Press* v. *United States,* 326 U. S. 1, 18–19, and cases cited; *Binderup* v. *Pathe Exchange,* 263 U. S. 291. Since the Sherman Act looks to substance rather than form (*United States* v. *Yellow Cab Co.,* 332 U. S. 218, 227), restraints which are unlawful when accomplished by a horizontal conspiracy must be equally unlawful when they follow as a natural consequence of a vertically integrated combination. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 376–377. To hold otherwise would be to emasculate the Act and make of it an inducement to integrated combinations with their serious tendencies to monopoly.

It would be no defense even if the trade restrained and monopolized by each of the vertical combinations were small in relation to the entire amount of commerce in the distribution and exhibition of motion pictures. "The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226; Cf. *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255.

But here the trade restrained by each is substantial. A large and important part of the pictures exhibited by any group of affiliated theatres comes from its affiliated distributor, and substan-

tially all of the distributor's pictures are taken by its affiliated theatres wherever it has such theatres. During the 1943–44 season, RKO distributed 38 features; Fox and Loew, 33 each; Paramount, 31; and Warner, 19. The features distributed by these five majors aggregated 154 of a total of 260 (excluding "Westerns") distributed by the eight distributor-defendants, and a total of 335 distributed by all national distributors (Fdg. 99, R. 3677). In 1945, Paramount had interests in 1,395 theatres; Fox, 636; Warner, 501; Loew, 135; and RKO, 109 (Fdg. 118, R. 3684). During the 1943–1944 season, theatres affiliated with Fox paid to it, in round numbers, $5,000,000 out of total film rental payments of $25,000,000. Comparable figures for the other major defendants are: Loew, $9,000,000 out of $20,000,000; Paramount, $14,000,000 out of $50,000,000; RKO, $4,000,000 out of $13,000,000; Warner, $6,000,000 out of $23,000,000 (Ex. 424, App. pp. 256–257).[1a] Clearly each vertical relationship results in a restraint and a monopolization of an "appreciable segment" of the market. The market thus

[1a] The number of corporations through which the theatres affiliated with each major defendant are held is: Fox, 235; Loew, 81; Paramount, 378; RKO, 73; and Warner, 33. The number in which each has a direct or indirect stock interest of 51% or more is Fox, 200; Loew, 50; Paramount, 179; RKO, 43; and Warner, 23. The number in which each has an interest of 50% is: Fox, 10; Loew, 21; Paramount, 128; RKO, 10; and Warner, 10. A detailed statement of these holdings appears at App. pp. 446–462.

closed to competition is much greater than that involved in the *Yellow Cab* case (replacements of 5,000 taxicabs in four cities) and in *International Salt Company, Inc.* v. *United States,* No. 46, this Term (119,000 tons of salt worth $500,000).

The fact that defendants' pictures are copyrighted provides no defense. It is true that under the Copyright Act the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others, but the Act gives no one any special privilege in the general operation of motion-picture theatres. The judgment here expressly sanctions the making of license agreements by the major defendants which contain every form of discrimination condemned in the opinion and findings, provided only that the license is for the exhibition of films distributed by it in a theatre or theatres in which it owns a direct or indirect interest of 95% or more (R. 3700). As noted above the unreasonable restraint of trade sanctioned by this provision of the judgment alone is substantial in extent. The court rested its sanction of clearance agreements between the defendants and others, which are intended to give "reasonable" protection to the licensee against competition from another theatre operator (R. 3530-3531), upon an analogy between them and a valid common law agreement of the seller to protect the good-will of a going business by an agreement not to compete with

the buyer for a reasonably limited length of time in a reasonably limited area. But no such analogy can sustain the unlimited restrictions which the judgment allows these distributors to incorporate in their licenses with their 95% owned theatres. The trial court therefore apparently assumed that such a privilege was granted by the Copyright Act.

Its error becomes apparent upon a consideration of *Interstate Circuit* v. *United States*, 306 U. S. 208, the most recent case discussing the extent to which the Copyright Act provides a defense against a charge of Sherman Act violation. If Paramount now adds a forty-five percent stock interest in Interstate Circuit to the fifty percent it presently has and had when that decision was made, it could in its license agreements with this affiliated circuit incorporate much the same clearance restrictions that were there found to violate the Sherman Act, without liability for contempt of the judgment entered here.[2] Paramount would then, the court below apparently assumed, merely be engaged in the exhibition of its own copyrighted films, a privilege

[2] Paramount could not now include a minimum admission price restriction in its licenses with Interstate's competitors. It could still agree with Interstate that if an independent competitor charged less than 25¢ admission, Paramount would not serve the independent with films until long after the films had played at an Interstate theatre. Paramount could also accomplish the same result without any agreement simply by not making prints available promptly to such competitors.

which the Copyright Act expressly grants to it. This assumption not only contradicts the existence of the separate corporate entities respectively employed by all of the major defendants in carrying on their distribution and exhibition businesses (see App. pp. 446–462), but also ignores the diverse functions of these entities and the function of the theatres themselves.

As the court below found, none of these theatres except for a limited number in the very largest cities could operate with the films of only one distributor (Fdg. 151, R. 3689). Neither the theatres of the defendants nor the theatres competing with them are an outlet for but a single distributor's films. These theatres compete in making available for the public all the films that each can profitably license from any distributor, and it was that competition in selling films to the public that was unlawfully suppressed in the *Interstate Circuit* case and here. Such suppression in *Interstate Circuit* impaired the ability of the independent to compete as a theatre owner and unlawfully protected Paramount as a 50% theatre owner. The restriction also gave Paramount additional revenue as a film distributor, but this Court flatly rejected the increase in film rental as a justification for the suppression of theatre operating competition which also resulted. The case was therefore a clear holding that the Copyright Act affords no sanction for

restrictions which suppress theatre operating competition simply because they are the most effective means of exploiting a copyright.

The Copyright Act gives a film distributor no more right to suppress competition among theatre owners by clearance agreements than it sanctions such a suppression by agreements to maintain a stated price. The distributors' assumption that they had a legal right to control price competition between theatres rested upon the false premise that they had a specially protected interest in the gross receipts of all theatres which exhibited their films, although they furnished only one part of the entertainment sold.

A motion-picture patron pays an admission fee for the privilege of sitting in a theatre for a period of time during which he may see one feature film, a newsreel, and a short subject, or two features, or any combination of feature films and other forms of entertainment which the theatre management sees fit to offer. Depending on his taste and opportunities, the patron may choose a comfortable seat in an air-conditioned theatre with a poor picture to look at, or a less attractive theatre from a physical standpoint with superior entertainment on the screen. In any event, the admission price he pays does not necessarily reflect the quality of the entertainment offered him by any particular film which appears on the program.

Everyone who contributes to this entertainment must, of course, look to the payment from the patron as the ultimate source of his reward for his patricular contribution. The maker of the projection equipment, the owner of the theatre building, the operator of the theatre, the producers of the films exhibited, the makers of the technical devices, and the possessors of the dramatic and other talent employed in their production, all have a similar stake in seeing that the patron pays the highest price consistent with maximum attendance, for the privilege of witnessing the ultimate entertainment to which they all contribute. Suppression of price competition among theatres may well be the most effective method of securing a maximum financial return for all of them, but a distributor's film copyright no more justifies the making of restrictive agreements which accomplish that result than patents possessed by other contributors to the entertainment world. The limits of the copyright or patent grant clearly are exceeded by license restrictions which control the terms on which not merely the licensors' product but related entertainment is sold to the public. *Mercoid Corp* v. *Mid-Continent Investment Co.,* 320 U. S. 661, 666.

There is thus no sanction in the Copyright Act for the use of theatres to suppress competition, regardless of whether they are wholly or par-

tially owned by a film distributor. The question presented by the lower court's sanction of restrictive agreements made by a defendant with a theatre operating corporation in which it has or may acquire control of 95% or more must therefore be determined by the application of Sherman Act principles. Control of another corporation by a Sherman Act defendant has never been thought to justify the making of agreements between them which unreasonably restrict the competition of others. *General Motors* v. *United States*, 121 F. 2d 376 (C. C. A. 7), certiorari denied, 314 U. S. 618. While such control may in practical effect make the use of such an agreement wholly unnecessary to accomplish the restraint desired, such control *per se* could never give a lawful sanction to such agreements where the parties deemed their use desirable or necessary.[8]

Since such agreements are in fact wholly unnecessary to accomplish the trade restraining purposes of the major defendants, any judgment which leaves them in control of their theatres sanctions the continued restraint of trade implicit in such ownership. But in view of the corporate structure of these combinations, whereby theatre owning and operating functions are performed by

[8] As noted at p. 87, *supra*, federal courts in private antitrust litigation involving similar violations by these defendants have enjoined distributors owning interests of 95% or more in certain theatres from discriminating in favor of those theatres in licensing films to them.

corporate entities separate from those engaged in production and distribution, the failure to divorce the theatre corporations from the others sanctions a continuing conspiracy among each group of affiliated corporations which is itself a continuing violation of Section 1 of the Act.

Even if each major defendant is regarded as a single trader, it is in no different position from a manufacturer of any article, copyrighted or not. Any manufacturer has the right to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize. But no manufacturer, whether of a copyrighted or an uncopyrighted article, has the right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of the market. The restraint on competition resulting from such integrations is particularly serious where, as here, there are only a few distributors, there are and can be only a limited number of theatres in any one competitive area, a large investment is required for new entrants into the exhibition field, and the downtown areas of large cities are built up so that it is difficult to secure adequate sites for new theatres. The continuing power thus acquired to exclude competition in the sale and purchase of pictures is unlawful because it "was not

obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227–228.

Nor does it make any difference that one of the reasons for the theatre acquisitions was that the actions of others were making it difficult for defendants to market their films. If others were violating the antitrust laws, that is no justification for defendants doing likewise. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 467–468; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188. And if others were securing an advantage over defendants by means of honest competition, defendants can not combat that advantage with unlawful conduct. The law requires that success in the market be attained by competition, not combination.

It can not be said that the Government is entitled to no relief against these vertical combinations because they are stale, most of them having been effected between 1919 and 1930. Cf. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417. In the case at bar the restraining effects of the combinations have continued to date, and are more serious now than when the integrations took place. Moreover, the market control provided by these vertical combinations has constantly been abused to the

prejudice of independent exhibitors, independent producers, independent distributors and the public. This persistent use of their theatres as a means of arbitrary suppression of the competition of others is itself conclusive evidence of the unlawful purpose of the major defendants' vertical integrations. *United States* v. *Reading Co., supra,* pp. 59–60; *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255, 259.

There is no economic justification whatever for the integration here involved. The distributor does not need its own theatres to "sell" its pictures to the patrons. Theatre-goers are attracted by the stars, the directors, the story, the national advertising done by the producers and distributors, and the quality of the picture. The quality of the theatre is an important factor, but there is no reason why independents cannot operate as good theatres as the distributors. Assuming two theatres of equal quality and location, a picture will attract as many patrons in one as in the other. Nor is there any saving to the patron through this integration. The number of steps in distribution is the same. There would seem to be a single reason for such affiliation, amply reflected in this record: a desire for market control with the resulting opportunity to control prices, exclude competition and extract monopoly profits both as a distributor and as an exhibitor.

The lower court's decree permits these vertical relationships to stand and expressly provides that

each major defendant may exhibit its pictures in its affiliated theatres on any terms it chooses. The effect of the decree is to put the judicial imprimatur on these integrated combinations and forever remove them and their serious trade-restraining consequences from the prohibitions of the anti-trust laws. We submit that the creation of these combinations was itself a violation of law and that their mere existence constitutes a continuing illegal restraint of trade. Under these circumstances dissolution of these combinations should be ordered. *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Reading Co.*, 253 U. S. 26, 63; *Northern Securities Co.* v. *United States*, 193 U. S. 197; 354-360; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78-82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 186-188; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 97; *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

There are further compelling reasons for divorcement here. In addition to the serious trade restraints which necessarily flow from the vertical integration of the five major defendants, all of the defendants have for years used these integrated positions to carry out the unlawful conspiracy found by the court below to restrain competition among themselves and with independents in both the distribution and exhibition of motion pictures throughout the United States. These

vertical relations have provided the incentive, the power and the very means for accomplishment of that unlawful conspiracy. In view of the demonstrated proclivity of defendants to use that power for such unlawful purposes, divorcement is a necessary measure to eliminate the conspiracy and restore competition to the industry.

The five major defendants have participated in the conspiracy for the dual purpose of eliminating competition in both distribution and exhibition. The three non-exhibitor defendants have participated for the purpose of restricting competition in the distribution field. The conspiracy had been effectuated through license agreements made by all eight defendants as distributors with the five major defendants as exhibitors specifying uniform terms as to runs, prices and clearances. By means of these uniform agreements, all of the defendants have eliminated competition among themselves as distributors. At the same time, they have protected the theatres of the five major defendants from the competition of independents.

So long as the five major defendants are permitted to retain their theatres and the eight distributor-defendants are allowed to enter into license agreements with them, all will have the same incentive and the same power to eliminate competition among themselves and with others. In fact it is inevitable that the exclusionary and price-fixing conspiracy will continue, albeit in a somewhat different form.

When a distributor defendant licenses a major's theatre and agrees on any terms which restrict the competition of others in exhibiting the same films, such agreement constitutes an understanding between those two defendants as distributors, since each major defendant is a distributor as well as an exhibitor. When two or more defendants as distributors license the theatres of a major with the same restrictive provisions, the net result is identical agreements between them restricting the terms on which their films will be made available to other theatres. Thus, precisely the same unreasonable competitive effects as resulted from the general horizontal conspiracy found below may be continued. Since such restrictions control admission prices, the defendants may even continue their price-fixing conspiracy.

Relief short of divorcement also will permit the defendants to retain the fruits of their unlawful conduct. The exclusionary conspiracy on runs was designed to give defendants' theatres a superior position, and the price-fixing and clearance conspiracy had the purpose and effect of protecting that position and the profits of those theatres. As the court below found, the conspiracy was successful. Consequently, the present superior position of the defendants' theatres throughout the important cities of the United States has been built up and maintained by defendants' conspiracy.

The decision of this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, supports divorcement in this case. There this Court approved divestiture of affiliates whose acquisition represented part of the fruits of the conspiracy, saying (p. 189): "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." Further, the Court approved divestiture of affiliations which induced joint action and agreement, saying (pp. 189-90): "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future."

We also think that *United States* v. *Swift & Co.*, 286 U. S. 106, while it involves a consent decree, provides strong support for dissolution of these combinations. There, this Court reversed a modification in 1930 of a consent decree entered in 1920. The complaint charged that the five major meat packers had achieved a joint monopoly of the distribution of meat by concerted action with each other, and that they had begun

to control the supply of groceries through ownership of refrigerator cars and branch houses. Possession of the latter facilities was alleged to give them such substantial advantages in distribution costs that they could undercut the prices of competitors not possessing the economic advantages of such integration. (286 U. S., at p. 110.)

All five packers, without expressly admitting any law violation, consented to an injunction against (1) owning any interest in a stockyards company, (2) making, selling or transporting 114 enumerated grocery products, (3) using or permitting others to use their distribution facilities for the handling of those grocery products, (4) selling meat at retail, (5) holding any interest in any public cold storage plant and (6) selling fresh milk or cream (286 U. S., at p. 111).

Ten years after this decree was entered, Swift and Armour prayed for a modification permitting them, *inter alia*, to own and operate retail meat markets, to make, sell and deal in the 114 grocery items, and to use and permit others to use their distribution facilities in handling those items. As grounds for the modification sought, the defendants were able to show that great changes in the methods of food distribution had occurred since the entry of the decree. Other vertically integrated combinations such as A. & P. had begun to dominate the grocery business. (See Record in *Swift* case, pp. 1045–1048.) It was stipulated that each of the defendants then had no monopoly

of meat distribution and was in active competition with the others in each geographical market where they bought and sold (*Id.* at pp. 1043–44). The district court granted the modification as to the grocery business because it thought that use of the packers' storage, transportation and marketing facilities for groceries as well as meat was "sound as an economic and business proposition" and that the presence of the new chains in the grocery field would prevent any grocery monopoly by the packers (*Id.* at p. 1058). In denying the meat retailing modification, however, the district court said (*Id.* at p. 1059):

> Whether such complete integration in merchandising from the producer to the consumer would produce better conditions as a whole is an economic question which is not for the Court to decide. The policy of Congress as shown by the statutes enacted by it and as interpreted by the Supreme Court is to preserve and stimulate competition, and to permit the defendants to engage in the retailing of their own products would, in my opinion, have the opposite result.

The United States appealed, but the defendants did not. In determining the propriety of the district court's grocery modification, this Court did not consider separately the prohibition against defendants' making, selling or transporting groceries from the prohibition of the use by anyone of their distribution facilities for that

purpose since it regarded one as necessary to supplement the other. After reciting the allegations in the complaint concerning the economic advantages inherent in the packers' vertical integration which enabled them to undercut independent competition in the grocery trade, this Court said (286 U. S. at p. 116):

> Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals.

The Court then pointed out that the decree was framed upon the theory that even after the meat monopoly was dissolved, each defendant packer would be "so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether". (286 U. S. at p. 116). The Court reasoned that the prohibition against engaging in the retail meat business and the grocery prohibition which the district court modified were both "directed against abuse of power by the individual units after the monopoly was over; and the death of the monopoly, the breaking up of the combination, if an adequate reason for terminating one of them, is an adequate reason for terminating both" (286 U. S. at p. 117). Then, after

reviewing the advantages inherent in the major packers' vertical integration which parallel those of the major defendants here, the Court said (286 U. S. at p. 119):

> The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints.

The consent decree there was also sustained because the defendants "chose to renounce what they might otherwise have claimed" (286 U. S., at p. 119). Nevertheless, the elaborate discussion of the economic power inherent in the vertical integrations and the asserted abuse of such power which led to the entry of the decree was evidently intended to show that the prohibition which the court below had modified on the ground of changed conditions continued to be appropriate relief so long as the power and economic incentive to repeat such an abuse was unchanged.

Here, as in the *Swift* case, there have been serious trade restraints resulting from horizontal agreements among the vertically integrated defendants. The defendants have demonstrated a proclivity to persist in such abuses of their power, despite the extensive use of injunctive provisions and administrative regulations intended to prevent them (*supra*, pp. 72–89). Consequently, removal by divorcement of the power to continue

such restraints through agreements among all the defendants as distributors with the five major defendants as exhibitors is necessary, if the decree is to end the unlawful practices, provide "such reasonable measures as would preclude their revival," and "effectively pry open to competition a market that has been closed by defendants' illegal restaints"[4] (see p. 60, *supra*).

We contend in Point III (*infra*, pp. 127–135) that the five major defendants should be prohibited from cross-licensing among themselves for a ten year period, while the long-range remedy of divorcement is being carried out. Such a cross-licensing prohibition would effectively eliminate the power of these five defendants to conspire among themselves as they have in the past. It would have no effect, however, upon the continuing incentive, power and proclivity of the three non-exhibitor defendants and each major defendant to eliminate competition among themselves and with others by the simple expedient of continuing to enter into the license agreements which gave rise to this conspiracy in the first place. And, as we also point out in Point III, a prohibition against cross-licensing without divorcement would not in any event provide the full relief necessary to restore competition to this industry.

[4] See, Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. of Ch. L. Rev. 567, 589, et seq.

B. THE TRIAL COURT SHOULD, IN ANY EVENT, HAVE COMPELLED THE MAJOR DEFENDANTS TO SELL THEIR STOCK INTERESTS IN THEATRE CORPORATIONS OWNED JOINTLY WITH INDEPENDENT EXHIBITORS

The district court found that according to Exhibit RKO-11 there were a total of 1,078 theatres jointly owned or operated by the major defendants with independent exhibitors which would be affected by the dissolution provision of its judgment (Fdg. 117, R. 3683–3684). The agreements for joint operation were ordered terminated by July 1, 1947. There were some jointly owned theatres in which either the defendant or the independent owned less than a 5 percent interest, which the court treated as *de minimis* (Fdg. 115, R. 3682–3683). The court held that the remaining joint ownerships were unlawful and should be terminated within two years "by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants" (R. 3699). In the case of purchase by a defendant, however, there must be a showing to the satisfaction of the court that such acquisition will not unduly restrain competition in the exhibition of motion pictures. The Government contends that all such illegal joint ownerships with independent exhibitors should be dissolved by sale of defendants' interests to non-defendants.

Each major defendant, in creating each of these joint ownerships, eliminated competition between it and an independent "for their more effective

competition against theatres not members of the 'pool'" (R. 3548). Such a resriction of competition was particularly unreasonable because each acquiring major was "a powerful factor in the industry capable of exerting vast influence to its ends" (R. 3556) and had habitually restrained and controlled normal competition.

The court made no inquiry into the precise circumstances under which any particular interest had been acquired and treated all such relationships alike insofar as their dissolution is concerned. It recognized the enormous extent of the joint interests acquired by the major defendants in independent theatre enterprises as an obvious consequence of the majors' extraordinary control over the film supply on which those independents were dependent for survival. For example, Loew did not license its films for a first run moveover to independent theatres in Atlanta, Georgia, and Providence, Rhode Island, until it had acquired a 50 percent interest in them (R. 578-579). The theatre pooling agreements in evidence (App., pp. 137-206) show that partial control of the film supply was the basic bargaining weapon with which every defendant entered a pooling negotiation with an independent, and that an important purpose of any such pooling arrangement was to make films available to the independent's theatre on terms that were not available to an independent operator. By allowing the defendants to buy these independents out entirely, the

decree will simply permit the defendants to complete the process of eliminating these independents which was begun in the first place by defendants' unlawful conduct and market control.

We agree with the finding that these relationships are unlawful, but they should have been dissolved by a sale of the defendants' interests under the doctrine applied in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. Only by such a sale may the defendants be deprived of the fruits of their unlawful conduct. Permitting a major defendant to take over an independent's interest entirely will lead to more serious results than those found to be illegal. While joint ownership eliminated putative competition between a major and an independant, at least there was an independent in business. The district court's decree, however, will permit complete removal of the independent from the exhibition field and allow the major defendant, already a powerful factor and guilty of serious restraints on normal competition, to increase its power. Instead of eliminating an existing restraint in a way calculated to increase competition, the decree will extend the scope of the restraint by imposing an even more serious one.

This provision is particularly unsound when considered in the light of the district court's conclusion that the defendants had both restrained and attempted to monopolize trade in the distribution and exhibition fields. It seems clear

that where defendants have attempted to monopolize an industry they should at the very least be prohibited from gaining any further power by any means whatsoever. The district court apparently applied this theory in enjoining the major defendants from expanding their present theatre holdings in any manner other than that under discussion (R. 3700). But it failed to follow that principle in its relief with respect to joint ownerships. There appears to be no valid reason for this difference in treatment.

While such acquisitions are subject to court approval, that condition does not, in the view of the Government, cure the deficiencies in the court's decree. It is our view that if joint operation or ownership is illegal *per se,* as the trial court found, that illegality can, under no circumstances, be terminated by a defendant's acquisition of its partner's interests to make the enterprise wholly owned and controlled by a defendant. The seriousness of leaving it open to a defendant to acquire exclusive rights is underlined by the expectation that, in most instances, the independent will be inclined to sell rather than buy, for separation from the major will deprive the independent of the protection which induced the affiliation.[8] The theatres in question also have a monopoly

[8] While defendants have so far reported to the district court no substantial dissolution of joint stock interests with independents, Paramount has reported that most of its partners are interested in selling to it rather than buying out Paramount.

value in the defendants' hands which they have for no one else. Therefore, any proposal to buy or sell at a fixed price would result in a purchase by the defendant instead of by the non-defendant.

The optional nature of the provision also produces a deadlock in those situations where neither the defendant nor the independent desires to sell. In such cases the effectiveness of the provision is left entirely to future litigation, the outcome of which cannot now be predicted. The Government proposes compulsory sale of defendants' interests to non-defendants as the only certain way of dissolving these pooling relationships, and as the only means of preventing the major defendants from extending an already illegally acquired control of theatres.

These compulsory sales to independents of the major defendants' stock interests in theatre-owning corporations will accomplish substantial divorcement relief as to some of the major defendants. It will not, however, divest them of local theatre-operating monopolies maintained through other corporations in which independents have no interest whatever.

C. THE LOWER COURT'S CONCERN THAT DIVESTITURE WOULD BE INJURIOUS TO DEFENDANTS AND THE PUBLIC PROVIDES NO BASIS FOR DENYING SUCH RELIEF

One of the reasons given by the lower court for denying divestiture was that it "would be injurious to the corporations concerned," and

"would be damaging to the public" because new theatre owners "would be quite unlikely for some years to give the public as good service" as the defendants (R. 3551, 3559, 3690).

We do not deny that divestiture of the theatre interests would injure the defendants. We do deny that the injury would be undue, or any more than is necessary to protect the public interest in free competition. This Court has said on several occasions that, while the primary duty in an antitrust case is to eliminate restraints and restore competition, consideration should be given to the interests of the general public and investors. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, 187; *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 453, 457. We know of no case, however, where divestiture has been refused because it would injure the corporate defendants that have violated the law. The true rule is that "those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

There are two answers to the trial court's concern over damage to the public. The first is that there is nothing in the record to suggest that independent interests cannot give the public as good service as the defendants. The trial court

was certainly not justified in taking judicial notice to this effect. The basic requisite for successful theatre operation is access to good pictures. Independent exhibitors have been deprived of this essential in the past by defendants' unlawful conspiracy. Given adequate films, it seems apparent that any competent businessman can give the public good service. There are four towns of over 100,000 which the defendants have not invaded (Fdg. 150, R. 3689). No one has suggested that the theatre-goers in these towns have suffered. The record here shows that the renowned Radio City Music Hall in New York City is operated by unaffiliated interests. And the Third Circuit Court of Appeals found in *William Goldman Theatres* v. *Loew, Inc.*, 150 F. 2d 738, 742, that the independent theatre there involved "as to management, reputation and in all other respects * * * was suitable for profitable exhibition of first-class feature motion pictures on first-run competition with the" Warner theatres in Philadelphia.

The second answer to the lower court's concern over public injury is that its conclusion is a paradox. The control over the industry exercised by the defendants, their system of fixed prices, clearances, and runs, and their various discriminatory practices for years have injured the public and deprived it of the advantages of competition. If these practices can be eliminated

and competition restored only through divestiture of the distributor-exhibitor relationship, it is contradictory to deny such relief on the ground that the public might be injured because the service of independent competitors might temporarily be inferior to that provided by the monopolists. Monopolists often may provide good service, but in the Sherman Act Congress has made the judgment that competition is, in the end, to the greater public advantage.[5a]

What has already been said serves, we think, to put at rest the objections made to divestiture by the court below on the grounds of injury to the defendants and to the public. An additional factor to be noted in this connection, however, is that the interest of the public in divestiture is not solely negative—avoiding injury to it; the interest of the public is a positive one—an interest in ensuring the distribution of more motion-picture products to more exhibitor outlets. If divesture is, as we think it is, the only way in which that end can be attained, then the public has a direct and affirmative interest in that remedy.

Motion pictures have become an important medium of expression and education. Their importance in controlling the thought and action of the American people has recently been the subject of a study dealing with the adverse public effects

[5a] A legislative determination that divorcement of exhibition from production is in the public interest was upheld in *Paramount Pictures, Inc.* v. *Langer*, 23 F. Supp. 890, 899 (N. D.), reversed for mootness, 306 U. S. 619.

of monopolistic practices in these fields.[a] Divestiture will make for greater independent production of motion pictures and more exhibition outlets willing and able to exhibit to the public not only those pictures produced and distributed by the defendants but also other products, with different outlooks and of different types, which now are made available to the public, if at all, only in small out of the way theatres access to which is unavailable to the public at large.

The evidence introduced at the trial was quite properly concerned with the commercial rather than cultural aspects of the film business. In our view the relief requested here which the trial court rejected is required by antitrust precedents in purely commercial fields and was so argued there. Nevertheless, the expediting court's remedy has implications affecting constitutional

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[a] See general report of The Commission on Freedom of the Press, *A Free and Responsible Press*, c. 6, pp. 82–83, 1947. The conclusions of the full commission, with respect to the problems here considered, may be summarized as follows:

1. The constitutional guarantee of freedom of the press should be recognized as including motion pictures. The growing importance of the documentary film gives fresh emphasis to the need.

2. The Government should use its antitrust powers to destroy monopolistic control of production, distribution, and theatrical outlets. A healthy competition within the industry conduces to that variety and quality of service which the public interest requires.

See also, subsidiary report, *Freedom of the Movies*, University of Chicago Press, 1947.

freedom of expression which may scarcely be ignored here.

The content of films, regardless of who produces them, or exhibits them, must necessarily be conditioned to some extent by the prejudices and moral attitudes of those who control the channels of distribution. Only by assurance that the distribution field is equally open to all may the fullest diversity of film content be had. The existing decree makes no attempt to give such assurance. In fact it gives assurance that the major distributors will continue to control the distribution of the most commercially valuable films in the future as they have in the past because it assures them of continued possession of a controlled market for their product which they are free to exploit in any discriminatory manner that they choose. The past performance of the defendants has been one of creating and maintaining a control of the film market expressly designed to prevent a diversity of financial rewards comparable to the diverse merits of the films they distributed. Certainly such a past gives little hope that they will in the future encourage production of the wide variety of films needed to satisfy the wide variety of tastes possessed by the potential American film audience, rather than a standardized mass product adapted to profitable exhibition in a controlled market.

The lower court's findings leave no doubt that

the freedom to exploit commercially films of the widest diversity by divers marketing methods has been illegally suppressed by the defendants in this case. The precise effects of that suppression are now incalculable. We know only from this record that they have been long continued and wide-spread. The decree under review established a system of affirmative regulation of the defendant's distribution practices as a substitute for measures required to restore that freedom, because such measures involve a high degree of dislocation of business ownership. We respectfully submit that this Court's past decisions require the rejection by this Court of that approach and the adoption of the relief here sought.

Our point can be succinctly stated by paraphrasing a sentence from Judge Learned Hand's opinion for the district court in *United States v. Associated Press,* 52 F. Supp. 362, 372: It is impossible to treat two theatres or two films as interchangeable, and to deprive a theatre or a distributor of the benefit of any service of the first rating is to deprive, *pro tanto,* the theatre-going public of means of information which it should have; "it is only by cross-lights from varying directions that full illumination can be secured."

When the *Associated Press* case came to this Court, the Court noted that the First Amendment, far from providing an argument against the applica-

tion of the Sherman Act, provided "powerful reasons to the contrary". 326 U. S. 1, 20. And Mr. Justice Frankfurter, concurring, rested his affirmance of the judgment upon the ground that the restrictions it prohibited "offend the basic functions which a constitutionally guaranteed press serves in our nation". 326 U. S. at 29. When here, as in the *Associated Press* case, the distribution of information is involved, "We do not agree that the corporation's property interests settle the question". *Marsh* v. *Alabama*, 326 U. S. 501, 505.

III

The district court should have prohibited cross-licensing among the major defendants

The Government proposed below to prohibit each major defendant from licensing films produced or distributed by it to another major defendant for use in its theatres for a 10-year period beginning one year after entry of the judgment. The one-year waiting period is designed to permit the defendants to make necessary adjustments through increased film production, or through selling theatres in areas where they could not operate all of their theatres with their own product plus that of the three non-exhibitor defendants and that of non-defendant distributors. The 10-year period is considered

sufficiently long to assure discontinuance of the major defendants' unlawful conduct. This relief is also required independently of divorcement as a means of inducing a prompt divesture of theatres in those towns where the defendants have a monopoly position. See *infra*, pages [redacted]. 132

A prohibition against cross-licensing is particularly appropriate relief in this case because it is directed at the very agreements by which the defendants effectuated their conspiracy. Each of the major defendants as a distributor has licensed theatres of the other majors as exhibitors on preferential terms including the conspiratorial prices, clearances and runs. Since these defendants are by far the largest exhibitors and among the most important distributors, the licensing agreements among them have set the pattern for the operation of the conspiracy in most of the large cities in the United States. So long as the right to make such agreements continues the pattern of restraints fixed by the conspiracy will persist. Under such circumstances use of these agreements should be prohibited at least until the effects of the conspiracy can be dissipated, even though the defendants are deprived of rights they otherwise might have. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 187–188; *Interstate Circuit* v. *United States*, 306 U. S. 208; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v.

Masonite Corporation, 316 U. S. 265; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

Even if defendants were prohibited absolutely from making restrictive agreements of any kind, each of them normally would tend to make its films available to the others upon the same runs they had enjoyed in the past and would continue to maintain the now customary periods of protection against later runs which were originally established by the illegal conspiracy. This can and has been done without a written agreement of any kind. For example, the record shows that Paramount did not conclude a license agreement with Loew's theatres in New York City for the 1944–45 season and did not serve them with any films until May 1945 (R. 811). Notwithstanding that there was no contract in effect during these negotiations which gave Loew a prior position in the playing of Paramount films in New York City, the showing of these films in independent subsequent-run theatres was delayed until after their exhibition by Loew (R. 782-893). Similarly, in many instances the defendants have done business with each other under contracts which contained no express clearance provisions, but simply permitted the licensee to play as many runs as it desired before the film was available to others (See Exs. 241, 273, 399, 471; App. pp. 45, 89, 116, 125, 127).

Of particular significance in this connection are net-profit-sharing license agreements between the major defendants, which the court below did not enjoin. Examples of such agreements are found in Exhibits 243 and 250 (See App. pp. 59, 97). These agreements show that Loew's pictures were licensed to Paramount's theatres in Chicago during the 1943-44 season for a share of the net profits derived from their exhibition, while, during the same season, Paramount's pictures were licensed to Loew's New York theatres for a share of the net profits derived from their exhibition. In the latter contract, no clearance or admission price terms appear, but the priority of Loew's theatres over subsequent runs on these films was maintained throughout the period covered pursuant to clearance established by prior agreement (R. 782-783).

The effect of such film licensing in unifying the financial interests of two or more defendants in exploiting a particular market is substantially the same as that of the theatre pooling arrangements which the court held unlawful.[1] It would seem that the major defendants' film licensing agreements with each other must be equally unlawful if consciously produced suppression of

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[1] See pooling agreements establishing a division of films among the parties to apply after termination of the agreements (Exs. 205, 218, 230, 386; App. pp. 137-147, 180-181, 193-194, 119).

competition by agreement is the test. The court, however, permitted such licensing to continue and such arrangements would not be ended by the competitive bidding system prescribed by the trial court.

While a prohibition against cross-licenses between the major defendants would not itself prevent their theatres from exhibiting the films of Universal, Columbia, and United Artists upon the prior runs now established, it would tend to break up the existing pattern of prior runs in the major defendants' theatres, which has required these and all other distributors to favor such theatres in the past, even in the absence of an ownership interest in any theatre. The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply, which enables them to set a pattern of run priority to which other distributors conform in selling in any market in which the defendants' theatres are located.

As we have pointed out earlier (*supra*, p. 108), if permitted to cross-license, the defendants can accomplish horizontal restrictive agreements among themselves, the very practice found unlawful by the court below. Since the major defendants are both distributors and exhibitors, the net effect of such cross-licenses is to use the noncompetitive outlets of each other to bring about

uniformity of licensing restrictions, and thereby eliminate competition among these five defendants and with others in both distribution and exhibition. We submit that the resulting uniform agreements are unlawful *per se. United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *International Salt Co., Inc.,* v. *United States,* No. 46, this Term. In any event, these cross-licenses must be prohibited if effective relief is to be granted against defendants' conspiracy to fix prices and playing positions by means of such licenses.

A prohibition of cross-licensing, in addition to preventing continuation of the very practices by the major defendants which the court below found unlawful, would tend to bring at least some independent competition into both distribution and exhibition fields. It would compel the major defendants, as distributors, to seek other prior-run outlets in the areas where they now employ each other's theatres for that purpose. It follows of course that a defendant would sell such theatres as it did not choose to operate with its own pictures plus those of the three nonexhibitor defendants and independent distributors. This record, however, shows that such operation in cities of over 25,000 is feasible, since independents operating first-run theatres in such cities have in the past generally existed with the product

of only one, two or three of the distributor-defendants (see Exs. 428, 428A, 432, App. pp. 299, 304, 308). In no case would any defendant be compelled to withdraw from any town as a theatre operator.

In towns where one defendant owns all of the theatres,[8] the primary effect of the prohibition would be to establish an independent theatre. This might occur by a sale of a defendant's theatre to an independent, or through new construction by an independent. In either event, the defendant's theatre operating monopoly in that area would be broken. Thus the relief provides a substantial degree of flexibility for the defendants in meeting its requirements.

There are no exact litigated precedents for such relief, since no other integrated manufacturers of products for mass consumption have enjoyed a similar mutual use of each other's retail outlets.[9] Relief restricting the number and character of

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[8] Theatre affiliates of Paramount have at least 220 of these closed towns, those of Warner at least 61, and those of Fox at least 63 (R. 359–369; Exs. 371, 397, R. 370, 2166). These are mainly towns of less than 25,000 population.

[9] Perhaps the closest approach to such a situation in Sherman Act litigation before this Court is represented by *United States v. Masonite Corp.*, 316 U. S. 265. But in that case the use of competing manufacturers as sales outlets for the products of one as a means of controlling resale prices was alleged to be permitted by patent license agreements. As shown (*supra*, p. 97), there is no basis here even for a claim of any comparable copyright license sanction.

retail outlets available to a national distributor is found in the consent decree before this Court in *United States* v. *International Harvester Co.*, 274 U. S. 693. That decree required the defendant to divest itself of some 5,000 retail outlets which it was alleged had been used to deprive other manufacturers of adequate retail outlets. This Court, in refusing additional relief sought by the Government, relied heavily on that provision as an adequate stimulus to competition. 274 U. S. at pp. 705-706. In *United States* v. *Swift & Co.*, 286 U. S. 106, this Court reversed a district court decision which had modified the 1920 consent decree against the major meat packers. This modification would have revoked a prohibition of the use of their distribution facilities for the marketing of certain grocery products made by them or by others which was included in the decree as assurance against their engaging in any part of the business of making or marketing such products. (See full discussion of *Swift* decision, *supra*, pp. 110-115).

A prohibition against cross-licensing among the major defendants should stimulate competition in both distribution and exhibition, but it will not deprive defendants of the fruits of their conspiracy, will not effectively reduce the power of defendants to the point necessary to permit independents to compete on a fair basis, and will not remove the restraints which automatically flow

from the vertical integration between each major distributor-defendant and its theatres. We propose a ban on cross-licensing as a necessary short-range remedy which will provide some relief during the long period required to bring about complete divorcement, and which supplies an economic incentive for divestiture of theatres in the cities where one or two of the major defendants occupy a monopoly position as theatre operators. Where three or four operate first-run theatres, the effects of such a prohibition in providing independent first-run outlets are unimportant, since there are then, non-competitive preferred outlets for the films of most of the major defendants.[10] But a prohibition against the use of major defendants' theatres as an exhibition outlet for the features of another does in any event provide an incentive, now lacking, for such defendants to compete with one another, both as theatre operators and as film distributors. This is essential to any effective relief which may be decreed.

CONCLUSION

We respectfully submit that this Court should reverse the judgment below and remand the case for the entry of a decree divorcing the major defendants from their affiliated theatres and pro-

[10] It should also be borne in mind that a flat prohibition of theatre acquisitions through dissolution of pools is a necessary complement of this relief. (See, *supra*, pp. 115–120.)

hibiting those defendants from dealing with each other until such divorcement is completed.

Respectfully submitted.

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